TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 522

MANUFACTURERS' FINANCE COMPANY,
PETITIONER,

vs.

FRANK M. McKEY, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF GRIGSBY-GRUNOW COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 9, 1934.

CERTIORARI GRANTED DECEMBER 3, 1934.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 522

MANUFACTURERS' FINANCE COMPANY,
PETITIONER,

vs.

FRANK M. McKEY, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF GRIGSBY-GRUNOW COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

	Page
Record from D. C. U. S., Northern Illinois	1
Placita	1
Bill of complaint	2
Answer of defendant	6
Order appointing temporary receivers	7
Order approving bonds of receivers	9
Consent to appointment of receivers	10
Petition of temporary receivers for leave to turn over funds belonging to Manufacturers Finance Co. and Manufacturers & Dealers Finance Corporation	10
Order authorizing receivers to turn over funds	12
Intervening petition of Manufacturers Finance Co.	13
Order granting Manufacturers Finance Co. leave to intervene	17
Answer of receivers to intervening petition	17
Order continuing temporary receivers as permanent receivers, etc.	19
Amendment to answer of receivers to intervening petition	21
Motion of intervening petitioner to strike answer and amendment to answer	22

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 5, 1935.

—5804-C

Page

Order denying motion to strike answer and amendment to answer to intervening petition 23
Statement of evidence 23
Caption 23
Testimony of George Whitfield 23
Seymour M. Lewis 25
Thomas L. Marshall 27
Michael Gesas 29
Judge's certificate 29
Stipulation of facts 30
Schedule A—Contract dated Oct. 5, 1933, between Grigsby-Grunow Co. and Manufacturers Finance Co. 46
Bond 52
Schedule B—Certificate of indebtedness 55
Exhibit C—Petition of receivers for directions 56
Exhibit "D"—Order giving certain directions to receivers 61
Amendment to stipulation of facts 62
Exhibit C—Letter, October 5, 1933, Grigsby-Grunow Co. to Manufacturers Finance Co. 66
Order that receivers pay $140,000 from special account, to Manufacturers Finance Co. toward principal of its advances 67
Order authorizing receivers to pay Manufacturers Finance Co. the balance due and owing at date of appointment of receivers, etc. 68
Order authorizing receivers to take up trade acceptances 69
Memorandum by Barnes, J. 70
Findings of fact and conclusions of law 73
Decree upon intervening petition 75
Petition for appeal 76
Assignment of errors 77
Order allowing appeal 78
Appeal bond 79
Stipulation waiving service of citation, etc. 80
Præcipe for record 81
Certificates of clerks 83
Proceedings in U. S. C. C. A., Seventh Circuit 87
Placita 87
Appearance of counsel for appellant 87
Appearance of counsel for appellees 88
Order setting cause for hearing 88
Motion for substitution of party appellee 89
Stipulation re substituting party appellee 90
Order substituting party appellee 92
Opinion, Sparks, J. 93
Judgment 98
Petition for rehearing 99
Order denying petition for rehearing 117
Petition for stay of mandate 118
Order staying mandate 119
Præcipe for record 120
Clerk's certificate 121
Order allowing certiorari 122

1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable John P. Barnes, District Judge of the United States for the Northern District of Illinois, on Thirty-First day of January, in the year of our Lord one thousand nine hundred and Thirty-Four, being one of the days of the regular December Term of said Court, begun Monday the Eighteenth day of December, and of our Independence the 158th year. Placita.

Present:

Hon. John P. Barnes.
H. C. W. Laubenheimer, U. S. Marshal.
Charles M. Bates, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois,

Eastern Division.

P. R. Mallory & Co., Inc., a corporation,
Plaintiff,
vs.
Grigsby-Grunow Company, a corporation,
Defendant.
} No. 13581

Be It Remembered, that the above-entitled action was commenced by the filing of the following Bill of Complaint in the above-entitled cause in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 23rd day of November, 1933.

3 * * (Caption) * *

BILL OF COMPLAINT.

To the Honorable Judge of the District Court of the United States, for the Northern District of Illinois, Eastern Division:

The plaintiff, P. R. Mallory & Co., Inc., a corporation, respectfully represents unto the court as follows:

1. That the plaintiff is a corporation duly organized and existing under the laws of the State of Indiana and is a citizen and resident of the State of Indiana with its principal office in the City of New York, County of New York and State of New York.

2. That the defendant, Grigsby-Grunow Company is a corporation organized and existing under and by virtue of the laws of the State of Illinois, and is a citizen of the State of Illinois and is a resident of the Northern District of Illinois, Eastern Division thereof and has its principal office and place of business in the City of Chicago, County of Cook and State of Illinois.

3. That this is a civil suit between citizens of different

States and that the matter in controversy herein exceeds
4 the sum or value of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.

4. That plaintiff files this bill on behalf of itself and on behalf of all other creditors of the defendant similarly situated who may desire to join in this bill of complaint and become parties thereto.

5. That defendant is indebted to the plaintiff in the sum of Fourteen Thousand Seven Hundred Eighty five and 61/100 ($14,785.61) Dollars, together with interest thereon, for goods, wares and merchandise sold and delivered by the plaintiff to the defendant; that such indebtedness is past due and is now due and payable to the plaintiff from defendant and plaintiff has not received and does not hold any security for said amount or any part thereof; that there are no set-offs, counter-claims or defenses against or in connection with said indebtedness or any part thereof; that plaintiff is informed and believes and therefore alleges that defendant is indebted to various other persons upon current liabilities in the sum of Two Million, Nine Hundred Seven Thousand Three Hundred Five and 99/100 ($2,907,305.99) Dollars, a large part of which is past due and in the sum of Two Million Three Hundred Forty Thousand Five Hundred ($2,340,500.00) Dollars upon a certain bonded indebtedness issued and outstanding and in the hands of a great many persons; that the claim of the plaintiff is admitted by the defendant and the defendant is unable to pay its debts and obligations in the regular course of business as they mature.

6. That the plaintiff is informed and believes and therefore alleges that the assets of the defendant, as a fair valuation, are worth an amount in excess of its liabilities; that for some years past it has maintained its principal office, factory and place of business in the City of Chicago; that it has carried on the business of manufacturing and distriguting
5 radios, electric refrigerators and other electric appliances; that in the prosecution of its business it employs approximately seven hundred persons; that the value of its fixed assets as shown by its books is the sum of Fourteen million, five hundred eighty four thousand thirty and 82/100 ($14,584,030.82) Dollars and that the value of its current assets as shown by its books is the sum of Four million one hundred fifty two thousand three hundred seventy eight and 67/100 ($14,152,378.67) Dollars; that the fixed assets and the current assets constitute one operating unit and have their larger value as such; that the defendant corporation has a

valuable good-will, the result of many years of advertising its products under its trade-name and has a dealer organization built up over a considerable period of time for the distribution of its products.

7. That by reason of the foregoing it is not possible for the defendant corporation to convert its assets into cash for the payment of its obligations; that attempts to convert its assets into cash for the meeting of all of its obligations as they mature would result in the destruction of the defendant corporation as an operating unit and result in great loss to the plaintiff and all other creditors similarly situated and all other parties in interest herein.

8. The plaintiff is informed and believes and therefore alleges that certain of the creditors of the defendant are threatening to take judgment on their claims and upon the recovery of judgments, to enforce the same by levy of executions; that the result of such threats, if carried into effect, would be to bring about the forced sale of such assets consisting chiefly of raw materials, goods in process of manufacture, finished products, supplies, accounts and bills receivable, machinery, equipment and good-will, all having at the present time a value in excess of the liabilities of the defendant; that
6 said creditors will thereby greatly embarrass the said defendant in the operation and conduct of its business; that the result of such threats and suits will be to bring about a multiplicity of suits with resultant injury to the property and good-will of the said defendant and loss to this plaintiff and all other creditors similarly situated; that the carrying into effect of the said threats will result in the shutting down of the plant and throw a large number of persons out of employment; that the value of the assets, property and good-will of the said defendant being largely dependent upon the continuation in business by it and the continuity of operations by it, the rights of the plaintiff as a creditor and the rights of other creditors cannot be fully protected, nor can the assets of said defendant be properly preserved and utilized in payment of its liabilities unless such property and assets of the defendant be at once taken in charge by this Honorable Court and a Receiver appointed of its property for the purpose of preserving it, collecting the debts due it, converting its property and assets into cash under the direction of this court and ultimately applying the same under the direction of this court in payment and satisfaction of the defendant's debts and liabilities.

Forasmuch, Therefore, as plaintiff is without an adequate and complete remedy, except in a court of equity, plaintiff prays, on behalf of itself and of all other creditors of said defendant who shall join herein, as follows:

1. That a writ of subpoena issue from this court against the said defendant, Grigsby-Grunow Company, a corporation, requiring it to appear in this court and answer to this bill of complaint, but not under oath (the answer under oath being hereby expressly waived), and to stand and abide by such orders and decrees as this court may, from time to time, adjudge and enter in the premises.

7 2. That the rights of plaintiff and of all other creditors of said defendant may be ascertained and decreed, and that this court fully administer the business, property and assets owned or operated by, or in which, the defendant is interested.

3. That this court forthwith appoint a receiver or receivers of said defendant and of all and singular the business, property and assets, operated, held, owned or controlled by the said defendant or in which said defendant is interested, with full power and authority to demand, sue for, collect, receive and take possession of all goods, chattels, rights, credits, moneys, choses in action, effects, lands, tenements, buildings, books, papers and property of every description belonging to said defendant or in which said defendant has any interest, and with all the other rights and powers ordinarily vested in receivers appointed by this court in similar cases, and also with full power and authority to operate the plants owned or controlled by the defendant, and to operate, administer and manage the business and affairs of the defendant, and to do any and all other acts which may be necessary or proper to preserve the rights and properties of the defendant and the business of the defendant, and to exercise such further powers as the court may from time to time grant.

4. That plaintiff may have such other and further relief in the premises as the nature o plaintiff's case may require and as to the court may seem proper.

P. R. Mallory & Co., Inc.

By: .....

Blum & Jacobson and
Archie Schimberg,
Attorneys for Plaintiff.

8 State of Illinois } ss.
County of Cook }

..... being first duly sworn, on oath deposes and says that:

1. He is the ..... of P. R. Mallory & Co., Inc., an Indiana corporation, and that he is duly authorized to execute, on behalf of said corporation the above and foregoing bill of complaint.

2. That he has read the above and foregoing bill of complaint, and that the allegations therein contained are true in substance and in fact, except such matters and things as are in said bill of complaint alleged to be upon information and belief, and that, as to such matters and things so alleged in said bill of complaint to be upon information and belief, he verily believes the same to be true.

.....

Subscribed and Sworn to before me, a Notary Public, in and for said State and County, this 23rd day of November, A. D. 1933.

.....

Notary Public.

My Commission Expires .....

9 And on, to wit, the 24th day of November, 1933 came the Defendant by its attorneys and filed in the Clerk's office of said Court a certain Answer in words and figures following, to wit:

10 * * (Caption) * *

Now comes the defendant, Grigsby-Grunow Company, and in answer to the bill of complaint filed herein says the defendant admists the averments of the said bill of complaint and joins in the prayer thereof.

GRIGSBY-GRUNOW COMPANY,
By B. J. GRIGSBY,
President.

ISAAC B. LIPSON,
Attorney for Defendant.

11 And afterwards, to wit, on the 24th day of November, 1933, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge appears the following entry, to wit:

12 * * (Caption) * *

ORDER.

This day this cause came on to be heard upon the application of plaintiff for the appointment of receivers for the defendant, and the same was submitted to the court upon the verified bill herein, the answer of defendant, and the evidence adduced, and the company appearing in open court by its president and counsel and consenting thereto and it appearing to the court that it is necessary, proper and advisable for the preservation of the assets, property, good-will, business and effects of said defendant and to secure equality in the distribution of said property and assets to the defendant's creditors and to grant the relief prayed for by plaintiff that receivers be forthwith appointed to take charge of, hold, manage, control and conduct the property, business, assets and effects of said defendant,

And the Court being fully advised in the premises, it is therefore hereby

Ordered, Adjudged and Decreed by the court that Thomas L. Marshall and Le Roi J. Williams be and they are hereby appointed temporary receivers by this court of all and singular the property, assets, effects, business and rights of Grigsby-Grunow Company, defendant herein, wherever situated, including all lands and buildings owned, held, pos-
13 sessed and controlled by said Company, and all property, equipment and machinery in connection therewith, and all moneys, choses in action, credits, bonds, stocks, leasehold interests, contracts and other assets of every kind and character and all other property, real personal and mixed, held or possessed by said defendant or in which said defendant has any right, title or interest, and all of the rights, privileges, franchises and immunities of said defendant, to have and to hold the same in pursuance of and under the orders and direction of this court, provided, however, that nothing herein contained shall impair the rights of any pledges of property of said defendant in connection with any of said property heretofore validly pledged to such pledgees.

And said receivers are hereby authorized and directed to take immediate possession of all and singular the property above described wherever situated or found, and to continue the operation of said defendant, and all officers, directors, agents and employes of said defendant and all other persons having property of said defendant in their possession or under their control, except the aforementioned pledgees, are hereby required and directed forthwith to turn over and deliver to such receivers or to their duly constituted representatives all property in their hands or under their control.

And said receivers are hereby further fully authorized and empowered to continue the business of said defendant as a going concern and to operate the same and manage its properties and to do all things necessary in order to preserve said property and continue the business of said defendant, including among other things taking charge of all books of account, records and other books, papers, files and documents of said defendant, employing and discharging and fixing the compensation of all necessary employees, agents, servants and attorneys employed by said receivers and purchasing from time to time on credit or otherwise such supplies
14 and equipment as may be necessary in the judgment of said receivers to enable them to continue said business as a going concern, and making such payments and disbursements out of any funds coming into their possession and incurring such liabilities and indebtedness as in their discretion may be necessary and proper in and concerning the protection, preservation and care of said property of said defendant and the carrying on of said business; all subject to such further orders as this court may from time to time make in the premises.

And said receivers are hereby fully authorized and empowered to institute and prosecute all suits that may be necessary in their judgment to the proper protection of the said property and business, and likewise to defend or prosecute all existing actions by or against said corporation and to defend all actions that may be brounght against them as such receivers or said corporation.

And the said receivers before entering upon their duties herein are hereby required each to give bond in the sum of Seventy five thousand dollars with security satisfactory to and approved by this court, for the faithful performance of their duties, and there being now presented to the court by each of the receivers, a receiver's bond with good and sufficient security and complying with all the provisions with

respect to a receiver's bond contained in the foregoing order, the said bonds and each thereof are hereby approved by this court and so marked.

And said plaintiff is hereby authorized to apply to any other United States District Court of competent jurisdiction for an order or orders in aid of the primary jurisdiction vested in this court and for an ancillary receivership herein.

All persons are hereby enjoined from interfering with said receivers in the possession of said property of said defendant and in the administration of their trust and in the performance of the duties imposed upon them as receivers herein, and said cause is hereby set for Devember 5, 1933, at ten A. M.

Dated: November 24, 1933.

BARNES,
District Judge.

And afterwards, to wit, on the 24th day of November, 1933, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John J. Barnes District Judge appears the following entry, to wit:

* * (Caption) * *

Friday, November 24, 1933.

Present: Honorable John P. Barnes, Judge of said Court.

Now comes Thomas L. Marshall and Leroi J. Williams, heretofore appointed Receivers of the above defendant Company and respectively present their bonds in the sum of Seventy Five Thousand Dollars each with good and sufficient surety, it is therefore

Ordered that said bonds and each of them, be and the same are hereby approved and ordered to be filed by the Clerk of this Court.

And on, to wit, the 25th day of November 1933 came the Defendants by their attorneys and filed in the Clerk's office of said Court a certain Consent to Appointment of Receivers in words and figures following, to wit:

19 November 25, 1933.

The undersigned, constituting five members, being all of the members of the Board of Directors of Grigsby-Grunow Company, hereby as a Board of Directors ratify and approve the action of the President of the corporation in consenting to the appointment of a receiver in the case of P. R. Mallory & Co. Inc. versus Grigsby-Grunow Company in the United States District Court No. 13581, and the filing of an answer admitting the averments of the complaint.

B. J. GRIGSBY,
LEROI J. WILLIAMS,
ALBERT F. MECKLENBURGER,
CARL L. SCHMIDT.

20 And on, to wit, the 25th day of November 1933 came the Receivers by their attorneys and filed in the Clerk's office of said Court a certain Petition in words and figures following, to wit:

21 * * (Caption) * *

PETITION OF TEMPORARY RECEIVERS FOR LEAVE TO TURN OVER FUNDS BELONGING TO MANUFACTURERS FINANCE COMPANY, AND MANUFACTURERS & DEALERS FINANCE CORPORATION.

To: The Honorable John P. Barnes, Judge of Said Court:

Your petitioners, Thomas L. Marshall and LeRoi J. Williams, respectfully represent that they were appointed Receivers herein on November 24, 1933, and their bonds fixed in the penal sum of $75,000.00 each, which bonds have been duly approved by this court, and your Receivers are now acting in such capacity.

Your petitioners further show that the defendant corporation herein has, from time to time, pledged its accounts receivable with the Manufacturers Finance Company and the Manufacturers & Dealers Finance Corporation; that, under its contracts with said finance companies, the defendant corporation herein was required to turn over and deliver to said finance companies any and all funds received by the defendant corporation from any of the assigned accounts receivable.

22 Your petitioners further show that, from day to day, various funds are received from debtors of the defendant

corporation on said accounts receivable, so assigned, which funds properly belong to the Manufacturers Finance Company and said Manufacturers & Dealers Finance Corporation.

Your petitioners further show that, under the terms of said contracts, which your Receivers has not as yet determined to recommend to the court for adoption or rejection, the finance companies have the right to notify the debtors under said accounts receivable, which debtors are distributors and dealers, and said finance companies have the further right to send their representatives to the offices of the defendant corporation, at the expense of the defendant corporation, to check moneys received by the defendant corporation on said accounts receivable.

Your petitioners further show that, if said finance companies did notify the debtors under said accounts receivable, so assigned, great loss would enure to the good-will of the defendant corporation or, if said finance companies sent representatives to the offices of the defendant corporation to check up said accounts receivable, a large expense would be entailed by the defendant corporation.

Your petitioners therefore show an order should be entered herein authorizing your Receivers to turn over and deliver to Manufacturers Finance Company and Manufacturers & Dealers Finance Corporation such funds as may be received by the Receivers herein from time to time upon accounts receivable owing to the defendant corporation which have heretofore been assigned to said finance companies.

Wherefore, your Receivers pray for an order herein authorizing them to turn over and deliver to Manufacturers Finance Company and/or Manufacturers & Dealers Finance Corporation, such funds as may be received upon accounts receivable of the defendant corporation which have heretofore been assigned to said Manufacturers Finance Company and/or Manufacturers & Dealers Finance Corporation on the same basis as prior to the filing of the Bill of Complaint. Thomas L. Marshall, Recr., being a Director in and atty. for Mfgrs. & Dealers Finance Corp. does not participate in this petition, and for such other and further relief as may be just and meet in the premises.

LeRoi J. Williams.

23 State of Illinois } ss.
County of Cook }

LEROI J. WILLIAMS, being first duly sworn, on their respective oaths depose and say that they are the duly appointed, qualified and acting Receivers of Grigsby-Gruno Company, a corporation; that they have read the foregoing petition, by them subscribed, know the contents thereof, and that the same is true.

(Signed) LE ROI J. WILLIAMS.

Subscribed and sworn to before me this 25th day of November, A. D. 1933.

MARIE ENDRIZZI,
Notary Public.

24 And afterwards, to wit, on the 25th day of November, 1933, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge appears the following entry, to wit:

25 • • (Caption) • •

AT CHICAGO, IN SAID DISTRICT, BEFORE THE HONORABLE JOHN P. BARNES, JUDGE OF SAID COURT, NOVEMBER 25, 1933.

This cause coming on this day to be heard upon the verified petition of Thomas L. Marshall and LeRoi J. Williams, temporary Receivers herein, for an order authorizing the said Receivers to turn over funds received upon accounts receivable of the defendant corporation which have heretofore been assigned to Manufacturers Finance Company and Manufacturers & Dealers Finance Corporation, and upon notice to all parties in interest, and no objection appearing, and the Court having examined said verified petition, and being fully advised in the premises,

It Is, Therefore, Ordered, Adjudged And Decreed that the Receivers herein be, and they are hereby authorized and directed to turn over and deliver on the same basis as prior to the filing of the Bill of Complaint herein, to Manufacturers Finance Company and/or Manufacturers & Dealers Finance Corporation such funds as may come into the possession of

the Receivers herein from accounts receivable owing to the defendant corporation which have, prior to the filing of the bill of complaint herein, been assigned to either said Manufacturers Finance Company and/or Manufacturers & Dealers Finance Corporation.

Enter:

BARNES,

District Judge.

26 And on, to wit, the 29th day of November, 1933 came the Petitioner by its attorneys and filed in the Clerk's office of said Court a certain Petition in words and figures following, to wit:

27 * * (Caption) * *

INTERVENING PETITION OF MANUFACTURERS FINANCE COMPANY FILED PURSUANT TO LEAVE OF COURT FIRST HAD AND OBTAINED.

To the Honorable, John P. Barnes, Judge of Said Court:

Your petitioner, Manufacturers Finance Company, respectfully represents that at all times mentioned herein it was a Delaware corporation with its principal office and place of business in the City of Baltimore and State of Maryland, and is licensed to do business in the State of Illinois; that the defendant, Grigsby-Grunow Company is an Illinois corporation with its principal office and place of business in the City of Chicago, County of Cook and State of Illinois.

Your petitioner further represents that on the 5th day of October, A. D. 1933, it entered into a contract in writing with said defendant at the City of Baltimore and State of Maryland, a correct copy of which said contract being hereto attached and marked Exhibit "A".

Your petitioner further shows that pursuant to the terms of said contract it purchased of and from said defendant its accounts receivable aggregating approximately $551,-
28 000.00 and paid to the defendant therefor approximately $265,000.00.

Your petitioner further respectfully shows that it has fully complied with its part of said contract and that heretofore on the 24th day of November, 1933, the foregoing proceedings were filed, and by an order of court duly entered of record, your Honor appointed Thomas L. Marshall and Leroi J. Wil-

liams temporary receivers and fixed their bonds at $75,000.00 each, which said bonds have been filed herein and were duly approved, and said receivers are now, and have been since their appointment and the approvel of the bonds aforesaid, been acting as receivers herein; that the appointment of said receivers was consented to in writing by said principal defendant.

Your petitioner further shows that in and by the terms of said agreement, it is provided that your petitioner is to purchase such accounts belonging to the defendant as may be acceptable to it, and pay therefor fifty per cent (50%) of the actual net amount thereof in cash upon the acceptance of such accounts, and the remaining fifty per cent (50%), less any deductions and plus any over payments by the respective debtors, and less the compensation and reimbursement of your petitioner, as provided in said contract, shall be paid to the defendant immediately upon payment of such amount to your petitioner, provided, however, that no payments of any such remainder need be made by your petitioner so long as any account or accounts purchased by your petitioner from the defendant shall be in any manner affected by any breach or violation of any warranty of the defendant, but such remainder and any moneys, accounts or property of the defendant which may come into the possession of your petitioner, whenever and however coming into such possession, may be by it held and thereafter applied to the payment of any such accounts; that in and by the terms of said contract said defendant among other things, that no receiver would be appointed for it; that every account purchased under the
29 terms of said contract by your petitioner and every settlement received thereon will be paid in full at the maturity thereof.

Your petitioner further shows that, contrary to the terms of said agreement, and in breach of the warranties therein contained, certain of said accounts receivable so purchased by your petitioner were not paid at maturity and contrary to the terms of said agreement and in violation of the warranties thereof, receivers for said defendant were appointed by this Honorable Court, by and with the consent of said principal defendant.

Your petitioner further shows that in and by said contract it is provided that if any warranty, expressed or implied, shall be broken or violated, whether through the act of the defendant or others, the damages to which your petitioner shall be entitled to recover from the defendant as a result

thereof, shall include all attorney's fees, court costs and other expenses which may be expended or incurred by your petitioner to obtain or enforce payment of any account purchased hereunder, or in the prosecution or defense of any action or concerning any matter growing out of or connected with the subject matter of said contract and the accounts purchased thereunder.

That in and by said contract it is further provided that the said defendant, in order to avoid objections by, and any loss of trade from any of the defendant's customers, through your petitioner collecting the said accounts direct from the debtors, the defendant is given the right and privilege to make collections at its office of all accounts sold to your petitioner, which said right and privilege hereinabove mentioned may, under said contract, be terminated by your petitioner at any time, and shall terminate immediately upon suspension of business, request for general extension, bankruptcy petition or any act amounting to a business failure by or against said defendant.

And in and by said agreement said defendant warrannts and agrees that it will transfer or deliver to your petitioner at its office in Baltimore, Maryland, on the day of the receit thereof, all original checks, drafts, notes and other evidences of payment received in payment of or on account of any accounts purchased under said contract by your petitioner.

Your petitioner further shows that the receivers have collected original checks, drafts, notes or other evidences of payment received by them in payment or on account of certain accounts purchased by your petitioner under said contract, the exact amount of which payments so received by said receivers is to your petitioner unknown, and which said receivers have failed to deliver to your petitioner.

Your petitioner further shows that on, to-wit: the 25th day of November, 1933, an order was entered herein authorizing and directing said receivers to turn over and deliver, on the same basis as prior to the filing of the bill of complaint herein, to your petitioner such funds as may come into the possession of the receivers herein from the accounts receivable owing to the defendant corporation which have, prior to the filing of the bill of complaint herein been assigned to your petitioner or any other finance company.

Wherefore, your petitioner prays that an order may be entered herein finding the title to the accounts so assigned to be vested in your petitioner and that your petitioner has the

right, power, authority and duty to retain and keep said accounts so assigned, and may collect and enforce the collection of same, using all proper diligence, until the unpaid balance due to your petitioner, to be determined by this court, plus its service charges, attorney's fees, costs and expenses, as is provided in said contract, shall be paid and reimbursed to your petitioner.

Your petitioner further prays the court that an order directing the receivers herein to deliver to your petitioner all moneys, or other evidences of payment, by them collected,
31 or on account of the accounts so assigned to your petitioner, together with any and all evidences of indebtedness received or held by them, arising out of the collection or attempted collection of said accounts, until such time as your petitioner shall have received the amount due to it, together with its reasonable attorney's fees, costs and expenses in this behalf expended, and to that end, if it be found necessary, to order an audit or accounting for the purposes thereof.

And your petitioner further prays for such other, further and different relief as the court may deem just and proper.

MANUFACTURERS FINANCE COMPANY
By: R. T. HAMILTON
Assistant Treasurer.

ROTHBART & LEWIS
Attorneys for Petitioner.

State of Illinois } ss.
County of Cook }

R. T. HAMILTON, being duly sworn, on oath deposes and says that he is the Assistant Treasurer and the duly authorized agent of Manufacturers Finance Company, the petitioner, in this behalf. That he has read the foregoing petition by him subscribed and that the same is true and correct to the best of his knowledge, information and belief.

R. T. HAMILTON.

Subscribed and sworn to before me this 28th day of November, A. D. 1933.

J. SCHNEIDER
Notary Public.

(Exhibit "A" attached to original is not hereto attached as it appears set forth in the stipulation of facts in this record.)

32 And afterwards, to wit, on the 29th day of November, 1933, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge appears the following entry, to wit:

33 * * (Caption) * *

ORDER.

This matter coming on for hearing on motion of Manufacturers Finance Company, a corporation, for leave to file its intervening petition herein, and for other relief, and it appearing to the court that due notice of said motion was served on all of the attorneys of record and on the receivers, and that the receivers appeared in open court and agreed to keep segregated all moneys and other evidences of payment received by them in payment of or on account of any account receivable heretofore assigned to said Manufacturers Finance Company, until the further order of this Court.

It Is Further Ordered, Adjudged and Decreed that leave be and the same is hereby given to said Manufacturers Finance Company to file its intervening petition herein, and a rule is entered on the receivers to answer the same on or before Tuesday, December 5, 1933.

Enter:

BARNES
Judge.

34 And on, to wit, the 6th day of December, 1933, came the Receivers by their attorneys and filed in the Clerk's office of said Court a certain Answer in words and figures following, to wit:

35 * * (Caption) * *

ANSWER BY RECEIVERS, THOMAS L. MARSHALL AND LEROI J. WILLIAMS, TO INTERVENING PETITION OF MANUFACTURERS FINANCE COMPANY.

The receivers admit that the intervening petitioner, a corporation of Delaware licensed to do business in Illinois, and Grigsby-Grunow Company, a corporation of Illinois, duly en-

tered into the written contract attached to the intervening petition, and that substantial advances of money thereunder were made to Grigsby-Grunow Company prior to the date of appointment of the receivers, which advances at said date approximated one-half of the face amount of accounts listed and assigned to intervening petitioner. No notice of such assignment of accounts was given to creditors prior to the date of appointment of the receivers. Interest charged by intervening petitioner to Grigsby-Grunow Company upon current balance of advances from time to time amounted to the rate per annum of approximately 20%.

According to the information of the receivers, the foregoing constitutes complete statement of facts and answer to pertinent allegations of fact contained in the intervening petition.

The receivers further state:

1. That in an effort to protect the entire amount of
36 accounts receivable of Grigsby-Grunow Company including the aforesaid accounts, all of which were in considerable jeopardy, the receivers have undertaken to spend a sizeable sum in advertising, have expended time and money in calling upon, and in various special communications and dealings with, debtors, all of which has redounded to the benefit of intervening petitioner in assuring return to intervening petitioner of its advances by way of collection by the receivers of the accounts receivable and without expense to this date to the intervening petitioner.

2. That the contract alleged in the intervening petition in substance involves merely a loan to Grigsby-Grunow Company of the amount of the advances and that no notice having been given to debtors of accounts, the barring order heretofore in this proceeding entered restrains the intervening petitioner from giving any notices upon such contract. That, as concerns the receivers appointed in a creditor's suit, the receivers can see no justification for equitable charge against them upon balances owing as of the date of the receivership, of an interest rate thereupon in excess of the legal maximum rate permitted by the laws of the State of Illinois.

3. That by practice between the Company and intervening petitioner prior to the receivership, one-half only of such designated accounts so collected were paid to intervening petitioner, the accounts so designated remaining substantially twice in face amount of net remaining advances, which arrangement intervening petitioner has been unwilling to retain.

4. That all collections upon such designated accounts,
37 which collections have been made since the date of appointment of the receivers, have been placed in a special account in the Continental Illinois National Bank and Trust Company of Chicago.

The receivers, upon hearing of this matter, will request the instructions of the Court as to the procedure they should follow in releasing to intervening petitioner sums in said special account and in accounting to intervening petitioner for interest and any other charges and claims.

THOMAS L. MARSHALL
LEROI J. WILLIAMS
Receivers Herein.

38 And afterwards, to wit, on the 5th day of December, 1933, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge appears the following entry, to wit:

39 * * (Caption) * *

ORDER.

This cause coming on again to be heard December 5, 1933, to which date the cause was continued in the order entered November 24, 1933 appointing Thomas L. Marshall and LeRoi J. Williams temporary receivers, and counsel for the parties being present and counsel for the intervening petitioner, counsel for a creditors' group, and counsel for the petitioners in the two pending petitions in bankruptcy also being present, and no objection being made thereto, and having heard the arguments and suggestions made, and being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed:

1. That Thomas L. Marshall and LeRoi J. Williams, having duly qualified, are now continued as receivers herein.

2. In addition to and in further ance of orders heretofore entered, the receivers are authorized to continue and to operate the business and to maintain the business and properties as a going concern, and in every respect to carry out this and other orders of the Court. In so doing the receivers are authorized to accept and assume liability for materials in transit at the time of their original appointment, to purchase materials, to employ labor, purchase commodities in connec-

tion with such business, to incur and pay travelling expenses and all other expenses incident to the conduct of the business and the carrying out of this order, to make commitments for and to carry out tooling and preparation for future products, to carry on a general business of manufacturing and selling radios, tubes and refrigerators, to maintain offi-
40 ces and to execute leases for reasonable periods, to pay for their commitments in cash or to operate on credit, to take possession of all property of the Company and to manage and operate it, to open and close bank accounts by their joint signature and to continue bank accounts by their joint signatures or by signatures as authorized in prior order, to reimburse themselves for their personal expenditures in connection with the business of the receivership and in connection with the carrying out of this order, to cooperate with and to make available necessary data to any groups attempting to formulate plans of reorganization or continuation of the business in any form, to manage and operate subsidiary corporations and to sell and liquidate the products or saleable assets thereof, to enter into license agreements respecting patents or other rights respecting products of manufacture or sale of the Company or its subsidiaries, to request the cooperation and assistance of the corporation and any executive officers thereof in any respect in which they may consider to the interest of the business, to collect, sell and to liquidate in the ordinary course of business not only goods manufactured and to be manufactured, but of inventories on hand, accounts, notes and any other assets, to complete manufacture of goods, and to proceed with the manufacture and sale not only of such goods but of future goods, to institute, prosecute, defend, settle or compromise litigation whether prior or subsequent to their appointment as receivers, to apply without further order for ancillary receiverships, and, without limitation by specific enumeration heretofore of powers, to take any reasonable steps in connection with the preservation of the properties and in the operation and maintenance of the business, which in their joint judgment, shall be deemed expedient, filing with the clerk of this Court reports of each month's operations hereunder.

41 3. In the employment of attorneys the receivers shall not be restricted in the employment of an attorney or firm of attorneys of which a receiver is a member.

Enter:

BARNES
Judge.

December 5, 1933.

42 And on, to wit, the 3rd day of January, 1934, came the Receivers by their attorneys and filed in the Clerk's office of said Court a certain Amendment to Answer in words and figures following, to wit:

43 * * (Caption) * *

AMENDMENT TO THE ANSWER OF THE RECEIVERS, THOMAS L. MARSHALL AND LEROI J. WILLIAMS, TO INTERVENING PETITION OF MANUFACTURERS FINANCE COMPANY.

Thomas L. Marshall and LeRoi J. Williams, Receivers herein, pursuant to leave of court first obtained, file this amendment to their answer to the intervening petition of Manufacturers Finance Company and say:

1. Paragraph 1 of the said answer of the receivers is amended to read as follows:

"1. That in an effort to protect the entire amount of accounts receivable of Grigsby-Grunow Company including the aforesaid accounts, all of which were in considerable jeopardy, the receivers have undertaken to spend a sizeable sum in advertising, have expended time and money in calling upon, and in various special communications and dealings with, debtors, all of which has redounded to the benefit of intervening petitioner in assuring return to intervening petitioner of its advances by way of collection by the receivers of the accounts receivable and without expense to this date to the intervening petitioner. All of the principal amount
44 of the advances and interest at the contract rate to November 24, 1933 have been paid to the petitioner."

2. Paragraph 2 of the said answer of the receivers is amended to read as follows:

"2. That the contract alleged in the intervening petition in substance involves merely a loan to Grigsby-Grunow Company of the amount of the advances and that no notice having been given to debtors of accounts, the barring orders heretofore in this proceeding entered restrains the intervening petitioner from giving any notices upon such contract. That, as concerns the receivers appointed in a creditor's suit, the receivers can see no justification for equitable charge against them upon balances owing as of the date of the receivership,

of an interest rate thereupon in excess of seven percent (7%) per annum."

3. The receivers deny that in equity the petitioner is entitled to recover its attorneys' fees.

THOMAS L. MARSHALL
LE ROI J. WILLIAMS
by T. M.
Receivers Herein.

45 And on, to wit, the 3rd day of January, 1934 came the Intervenor by its attorneys and filed in the Clerk's office of said Court a certain Motion to Strike in words and figures following, to wit:

46 * * (Caption) * *

MOTION TO STRIKE OUT ANSWER AND AMENDMENT TO ANSWER FILED BY RECEIVERS HEREIN, TO THE INTERVENING PETITION OF MANUFACTURERS FINANCE COMPANY.

Now comes Manufacturers Finance Company by Edward Rothbart, its attorney, and moves the Court to strike out the answer and the amendment to the answer filed by the receivers herein, to the intervening petition of Manufacturers Finance Company, on the ground that said answer and said amendment to the answer are clearly insufficient in point of law, and should be stricken out pursuant to Rule 33 of Rules of Practice in the Courts of Equity of the United States.

EDWARD ROTHBART
Attorney for Manufacturers Finance Company, Intervening Petitioner.

December 29, 1933.

47 And afterwards, to wit, on the 31st day of January, 1934, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge appears the following entry, to wit:

18 • • (Caption) • •

ORDER.

On motion of the receivers, leave is hereby given to the receivers to file an amendment to the answer of the receivers, to the intervening petition of the Manufacturers Finance Company.

Leave is also given to the Manufacturers Finance Company to file its written motion to strike said amendment to the answer and said original answer filed by the receivers herein to the intervening petition of Manufacturers Finance Company, all nunc pro tunc as of December 29, 1933.

It Is Further Ordered, Adjudged and Decreed that the motion of Manufacturers Finance Company to strike from the files the answer of the receivers and the amendment to the answer of the receivers to the intervening petition of Manufacturers Finance Company be and the same is hereby denied.

To the entry of which order, the intervener Manufacturers Finance Company, excepted, and still excepts.

Enter:

BARNES
Judge.

January 31, 1934.

49 • • (Caption) • •

TRANSCRIPT IN NARRATIVE FORM OF TESTIMONY GIVEN AT TRIAL ON THE INTERVENING PETITION OF THE MANUFACTURERS FINANCE COMPANY, INTERVENER.

In the following narrative of testimony the appellant—intervener—will be referred to as the intervener and the appellees as the receivers.

GEORGE WHITFIELD, a witness in behalf of the receivers testified:

I reside in Chicago, Illinois. I was Assistant Treasurer of the Grigsby-Grunow Company and I am employed by the receivers as Chief Accountant. Since November 24, 1933 upon the accounts described as assigned to the Manufacturers Fi-

nance Company the collections have been a little better than $350,000.00. At the time of the receivership the collections were practically at a stand-still and so remained for a week or ten days. After that collections were very small on account of the doubt in the minds of the distributors as to whether they should pay their bills or not. Toward thawing out these accounts there was an advertising appropriation of $35,000.00; there was considerable effort made to collect; those accounts were placed with different employees of the company, particularly Mr. Shadley and the receivers went down and had a meeting with the Eastern distributors in New York in an effort to get loose some of the moneys because collections were just stopped.

Mr. Rothbart: I would like to enter a general objection, Your Honor. This is wholly immaterial.

The Court: Overruled.

50 Mr. Rothbart: Exception.

To which ruling of the Court, the Intervening Petitioner, by its counsel, then and there duly excepted.

Mr. Whitfield: There was a price concession on one particular line of a substantial amount. In fact, in my opinion there was practically everything being done, a combination of items, to thaw out the accounts. There were price concessions. We took back merchandise and we put through special allowances. It was necessary to get some money and so we strove to get them. The accounts were frozen. The Manufacturers Finance Company did not contribute toward that expense. No notice was given to the debtors by the Manufacturers Finance Company of the assignment of the accounts, with the exception of trade acceptances and on trade acceptances, notices were given.

On cross-examination, Mr. Whitfield testified that it was not the custom or practice of the Manufacturers Finance Company or the other finance company Grigsby-Grunow dealt with to give notice to parties of assigned accounts. There was some discussion relative to giving notice to debtors, and we decided to hold off for a while and to my knowledge no notice was given, either before or after the appointment of the receivers. Although the distributors owed Grigsby-Grunow for the merchandise that was delivered to them, not knowing whether the business was going to continue or not, we expected difficulty in collecting the accounts. With respect to the $350,000.00 above mentioned, there was included in that amount $84,000.00 in trade acceptances purchased by

Manufacturers Finance Company from Grigsby-Grunow Company.

On re-direct examination, Mr. Whitfield testified:

All of the assigned accounts were from distributors. The larger distributors owing the most money resided in the East and the receivers went to New York to discuss the matter with the distributors, because our efforts here in Chicago had been unsatisfactory in connection with getting the co-
51 operation of the Eastern distributor. In our case the Eastern distributors are the ones that owe the big amount of money, and we have the small distributors and the smaller accounts throughout the rest of the country. I know that the $35,000.00 advertising appropriation was expended immediately after its authorization.

On re-cross-examination, Mr. Whitfield testified:

The advertising generally consisted of special appropriations to the distributors of money to be spent by them. It was not paid in cash. It was just in the form of credit memos to their accounts.

Q. Well, just what was the advertising? This money you alloted to the distributors to do their own advertising?

A. It was alloted to the distributor.

Q. To do advertising?

A. In the local territory.

Q. Just an inducement to the distributor to continue in the fold of Grigsby-Grunow?

A. To continue with Grigsby-Grunow.

Mr. Marshall: Is it agreed that the signature of LeRoi J. Williams to the petition attached to the stipulation of facts filed herein may be treated as if the said LeRoi J. Williams had testified in open court at this trial to the allegations of the said petition?

Mr. Rothbart: Yes.

Thereupon Seymour M. Lewis testified on behalf of the intervening petitioner that he resides in Chicago, Illinois and is a member of the firm of Rothbart & Lewis, attorneys for Manufacturers Finance Company and a member of the Bar, and admitted to practice in this court. That he is familiar with the work done by Rothbart & Lewis in connection with the matter of the Manufacturers Finance Company's claim against Grigsby-Grunow. There were conferences with the client, both in the office and at their place of business; going through voluminous records and files and examination of the

court records and files. Preparing the intervening peti-
52 tion; checking the answers and looking up the law; and conferring with the receivers and with the attorneys. There were approximately sixteen days spent. Our office prepared a stipulation of facts and a trial brief. Preparation of the trial brief. I included in looking up the law.

On cross-examination Mr. Lewis testified that there were sixteen full days time. The witness said he was aware of the fact that all orders for obtaining money to the intervener was upon motion of the receivers and not upon the motion of the intervener, but that prior to that time Mr. Rothbart spent a great deal of time and so did the witness in looking up the law to determine the status of the Manufacturers Finance Company legally in this court on the question of the right to demand and receive that money. I am aware of the fact that there is another finance company, the Manufacturers & Dealers Finance Corporation.

Q. Are you aware that they didn't consider it necessary to file an intervening petition?

Mr. Rothbart: To which I object. I don't think it is competent to go into this record.

The Court: Overruled.

Mr. Rothbart: Exception.

To which ruling of the Court the intervener by its counsel then and there duly excepted.

Mr. Marshall: Are you aware that a special bank account was opened before your intervening petition was ever filed?

The Witness: A. No. I think an order was entered segregating all moneys received by the receivers.

Mr. Marshall: Q. Are you aware that the funds of the Manufacturers & Dealers went into that account equally with yours?

A. I think an order was entered segregating all moneys received.

Q. And that referred to the Manufacturers Finance Company as well as to the Manufacturers & Dealers?

A. I don't know about the Manufacturers & Dealers.

Q. Have you any reason to believe that those funds would not be segregating if you had not filed an intervening petition?

53 A. If I draw upon the knowledge I have had in similar cases, bankruptcy cases, and receivership case in the past, yes.

Q. But in this case?

A. Not applying it particularly to this case, no.

When the matter came to us it was our idea that the moneys would not be segregated and we would have to file an intervening petition and we would have to proceed before the Court to collect the moneys due to the Manufacturers Finance Company on these accounts that were assigned. When the matter came into our office we had not discussed the matter with the receivers or anyone in connection with it. We took the matter in, conferred with our clients, prepared ourselves and we proceeded on the theory that a petition would have to be filed and we would go into court and we were to prosecute it. There was approximately sixteen full days spent on this. It took about two hours to prepare the intervening petition. About a day and a half to prepare the stipulation of facts. A trial brief was prepared. We represent this finance company and have had experience in bankruptcy courts and other courts on this same issue. While we are generally familiar with the matter, I do not carry all the cases in my mind.

Thereupon, THOMAS L. MARSHALL, one of the receivers, was called as a witness for the intervener.

Q. Is is true, Mr. Marshall, that the receiver never contested anything but the interest in this matter?

A. The interest and the attorney's fees. I told you
54 that if you would settle for 7% interest from the date of receivership, with no attorney's fees, we would recommend it.

Q. That is not what I am getting at. Did the receiver, or you as the receiver, since your appointment, contest any other portion of the claim of the Manufacturers Finance Company in this matter other than the interest or attorney's fees?

A. I don't know what you are driving at.

Q. I am driving at this—

A. I know we were prepared at all times to pay you your interest and compensation up to November 24th.

Q. Do you recall the day after you were appointed as receiver my coming over to your office and discussing this matter with you and particularly with respect to the re-payment of the reserve?

A. Yes, there was at the start a discussion as to whether instead of putting in a special account of collections whether the practice could not be followed which was followed prior to the receivership as we were inofrmed, namely—being the

receivers were then in need of cash—to take half the collections, leaving your accounts outstanding double the amount of your advances.

Q. You wanted us to pay back to the receiver one half of all moneys collected on the assigned accounts?

A. No, not all moneys collected.

Q. One half of all moneys collected on the assigned accounts?

A. We thought you would preserve your security amply, and likewise we would get cash with which to operate on. I insisted upon this, but you (meaning Mr. Rothbart) did not accept it. You (meaning Mr. Rothbart) made a counter proposal at that time. You said that if we would pay $150,000.00 you would be disposed to recommend that that scheme be put in operation. By the time we got $150,000.00 we didn't need money and at the time I was appointed receiver and shortly thereafter that problem was in mind, but I said to you, and you understood, that there was at no time any issue as to
55 your right to get principal back and your compensation up to November 24th.

Q. By "principal back" you mean principal as the accounts were collected?

A. Of the advances from accounts collected. And in addition there had been prepared by the receivers prior to the time you turned up in the picture at all, the petition for a special account and as a matter of fact, a special account was opened and established in the Continental Bank before you filed your petition, your intervening petition.

Q. But the order you had prepared at that time provided for the repayment of the reserve in the same manner that existed prior to the appointment of the receivers?

A. There was no such order enterd.

Q. Read the order that I hand you, please. (handing document to witness).

A. That is the order—

Q. The portion that was written in.

A. (Reading from document): "It is therefore ordered, adjudged and decreed that the receivers herein be and they are hereby authorized and directed to turn over and deliver on the same basis as prior to the filing of the bill of complaint herein, to Manufacturers Finance Company and/or Manufacturers & Dealers Finance Corporation, such funds as may come into the possession of the receivers herein from the accounts receivable owing to the defendant corporation, which

have, prior to the filing of the bill of complaint herein been assigned to either said Manufacturers Finance Company and/or Manufacturers & Dealers Finance Corporation." I don't know whether that order was entered or not. If it was, it was never acted on. We discussed it at that time and you objected to the repayment of the reserve. I am acquainted with the fact that the Manufacturers & Dealers Finance Corporation, who were likewise one of the creditors of Grigsby-Grunow, didn't see fit to file an intervening petition in this
56 matter and it appears of record in this proceeding that I was the attorney for and director of Manufacturers & Dealers Finance Company and I may say that I told them I saw no occasion for filing such petition and I saw no necessity for incurring, on the part of the receivers, any additional expense and I will say further that I was not acting as their attorney in this matter, and I am not now.

Thereupon, MICHAEL GESAS testified on behalf of the intervening petitioner:

I reside in Chicago and I am a member of the Bar and admitted to practice in this court. From the facts given to me and basing it on the amount involved, being $261,000.00, I would say that 3% of that, $7,800.00 would be reasonable attorney's fees on a 15-day basis.

On Cross-examination, Mr. Gesas testified that he was basing his answer on an actual necessary expenditure of 15 days time and $261,000 involved, and that would not be his opinion if the total amount in dispute was $4,394.48.

On re-Direct examination, Mr. Gesas testified:

Q. Mr. Gesas, taking into consideration that a client came to you with a claim of $261,000.00 against a concern for whom receivers were appointed and the receivers were operating the business; that it was impossible for you to collect money except through court proceedings or coming into court; that you had to familiarize yourself with the proceedings; that you had to find out all the facts pertaining to your claim and that it was a complicated financial deal. Would that affect your answer any?

A. If the accomplishment were through the efforts of counsel, I would say, as I have stated before, that the reasonableness of the fee of 3% stands as I have answered it before.

At this point the stipulation of facts signed by the intervening petitioner and the receivers was filed and both the intervener and the receivers rested.

57 I, John P. Barnes, Judge of the United States District Court for the Northern District of Illinois, Eastern Di-

vision, before whom the above entitled cause was heard on the intervening petition of the Manufacturers Finance Company, intervener, do certify that the transcript of evidence hereto, together with the exhibits, as well as said stipulation of facts and amendment to said stipulation of facts, and in the appellant's praecipe filed in this case, is and constitutes the evidence and all the evidence offered or considered by the Court in this cause.

JOHN P. BARNES
Judge of the United States District Court.

Signed at Chicago, Illinois, this 13th day of February, A. D. 1934.

O. K.
EDWARD ROTHBART
Atty. for Petitioner.

O. K.
THOMAS L. MARSHALL
LE ROI J. WILLIAMS
By W. BLOOD

58 (Endorsed) * * (Caption) * * Transcript in Narrative Form of Testimony Given at Trial on the Intervening Petition of Manufacturers Finance Company, Intervener. Filed Feb 13 1934 Charles M. Bates Clerk.

59 And on, to wit, the 29th day of December, 1933, came the parties by their attorneys and filed in the Clerk's office of said Court a certain Stipulation of Facts in words and figures following, to wit:

60 * * (Caption) * *

STIPULATION OF FACTS IN CONNECTION WITH THE INTERVENING PETITION HERETOFORE FILED BY MANUFACTURERS FINANCE COMPANY, AND THE ANSWER OF THE RECEIVERS THERETO.

It Is Stipulated And Agreed by and between Manufacturers Finance Company, a corporation, the intervening petitioner, and LeRoi J. Williams and Thomas L. Marshall, receivers, that the following are the facts pertaining to the issues in controversy:

1. That on the 5th day of October, 1933 the defendant, Grigsby-Grunow Company executed the contract hereto at-

tached and marked "Exhibit A" and made a part hereof as though the same were fully incorporated herein, and forwarded the same to the intervening petitioner at its office in Baltimore, Maryland; that at the city of Baltimore, in the State of Maryland the intervening petitioner, through its authorized officers, signed and accepted said contract; that Manufacturers Finance Company is a corporation created and existing under and by virtue of the laws of the State of Delaware; that the Manufacturers Finance Company, prior to and since the date of the contract, was, and now is licensed to transact its business in the State of Illinois; that the defendant Grigsby-Grunow Company is now and was at all times an Illinois corporation.

61 2. That after the execution and delivery of the contract "Exhibit A," the intervening petitioner issued its checks in payment of assigned accounts receivable, dated and payable to defendant, less certain deductions for bond premiums and repurchase items, which checks were cashed by the defendant, as follows:

Date	Amount
October 5, 1933	$ 99,185.71
Bond Premium	1,000.00
Total Remittance	$100,185.71
October 6,	$ 23,562.73
Bond Premium	250.00
Total Remittance	$ 23,812.73
October 7,	$ 22,487.73
October 9,	$ 2,977.54
Bond Premium	250.00
Total Remittance	$ 3,227.54
October 9,	$ 22.814.58
October 10,	$ 22,637.25
Bond Premium	500.00
Total Remittance	$ 23,137.25
October 11	$ 10,819.98
October 13	$ 7,250.00
Repurchase Item	1,390.72
Total Check	$ 5,859.28

Date	Amount
October 13,	$ 21,380.43
October 14,	$ 7,582.91
October 17,	$ 2,182.65
October 17,	$ 6,383.74
October 18,	$ 20,409.68
October 18,	$ 24,812.11
October 18,	$ 2,500.00
October 19,	$ 4,196.37
October 20,	$ 17,759.19
October 20,	$ 15,855.93
October 21,	$ 8,000.00
October 21,	$ 16,681.17
October 24,	$ 11,272.04
October 24,	$ 10,606.68
October 25,	$ 6,893.84
October 26,	$ 10,159.28
October 27,	$ 17,651.94
October 27,	$ 1,625.00
October 28, 1933	$ 9,514.28
October 30,	$ 13,498.80
October 31,	$ 10,740.15
November 1,	$ 11,824.87
November 1,	$ 1,437.00
November 2,	$ 28,324.43
November 3,	$ 14,711.06
November 3,	$ 32,017.85
November 3,	$ 14,302.72
November 3,	$ 5,000.00
November 4,	$ 18,190.56
November 6,	$ 8,979.39
November 10,	$ 5,488.57
November 14,	$ 12,156.72
November 14,	$ 8,817.93
November 14,	$ 9,800.11
November 14,	$ 1,715.00
November 16,	$ 3,400.00
Repurchase Item	$ 1,953.09
Total Check	$ 1,446.91
November 16,	$ 7,151.57
November 16,	$ 2,500.00
November 1,	$ 1,091.22
November 17,	$ 17,023.20
Repurchase Item	$ 1,280.53
Total Check	$ 15,742.67

Date	Amount
November 17,	$ 4,071.20
November 17,	$ 2,500.00
November 20,	$ 13,199.50
November 20,	$ 13,533.72
,November 20,	$ 12,879.60
November 20,	$ 11,582.53
November 21,	$ 5,350.24
Repurchase Item	$ 2,973.73
Total Check	$ 2,376.51
November 22,	$ 12,644.50
Repurchase Item	$ 5,163.23
Total Check	$ 7,481.27
November 22,	$ 13,342.41
November 22,	$ 12,043.42
November 22,	$ 5,000.00
November 23, 1933	$ 4,227.34

aggregating $754,987.07, and the defendant assigned accounts receivable, trade acceptances and other evidences of indebtedness to the intervening petitioner on the form of assignment (sometimes termed schedule), a sample of which is hereto attached and marked "Exhibit B," and in each instance such schedule was duly signed by the defendant,

63 as follows:

Date	Amount
October 5, 1933	$200,371.43
October 6,	$ 47,625,47
October 7,	$ 44,975.47
October 7,	$ 6,455.08
October 9,	$ 45,629.17
October 10,	$ 46,274.49
October 11,	$ 21,639.96
October 13,	$ 14,500.00
October 13,	$ 42,760.87
October 14,	$ 15,165.82
October 17,	$ 4,365.30
October 17,	$ 12,767.47
October 18,	$ 40,819.36
October 18,	$ 49,624.23
October 18,	$ 5,000.00
October 19,	$ 8,392.74
October 20,	$ 35,518.38
October 20,	$ 31,711.87

Date	Amount
October 21,	$ 16,000.00
October 21,	$ 33,362.34
October 24,	$ 22,544.09
October 24,	$ 21,213.37
October 25,	$ 13,787.67
October 26,	$ 20,318.57
October 27,	$ 35,303.88
October 27,	$ 3,250.00
October 28,	$ 19,028.56
October 30,	$ 26,997.60
October 31,	$ 21,480.50
November 1,	$ 23,649.73
November 1,	$ 2,874.00
November 1,	$ 56,648.87
November 2,	$ 29,442.12
November 2,	$ 64,035.79
November 3,	$ 28,605.44
November 3,	$ 10,000.00
November 4,	$ 36,381.12
November 6,	$ 17,958.78
November 10,	$ 10,977.14
November 13, 1933	$ 24,315.44
November 13, 1933	$ 17,635.87
November 13, 1933	$ 19,600.23
November 14, 1933	$ 3,430.00
November 16, 1933	$ 6,800.00
November 16, 1033	$ 14,303.15
November 16, 1933	$ 5,000.00
November 16, 1933	$ 2,182.45
November 16, 1933	$ 34,046.40
November 16, 1933	$ 8,142.40
November 17, 1933	$ 5,000.00
November 20, 1933	$ 26,399.00
November 20, 1933	$ 27,067.45
November 20, 1933	$ 25,759.21
November 20, 1933	$ 23,165.07
November 21, 1933	$ 10,700.48
November 22, 1933	$ 25,289.01
November 22, 1933	$ 24,086.84
November 22, 1933	$ 26,684.82
November 22, 1933	$ 10,000.00
November 25, 1933	$ 8,454.69
November 24, 1933	$ 4,627.82
November 24, 1933	$ 7,106.09

aggregating $1,547.230.81.

3. That since the date of the contract there has been delivered by the defendant moneys or checks as follows:

65

Date	Remittance No.	Amount of Cash
10-10-33	17653	$ 3,657.03
10-11	17572	4,107.46
10-11	17706	2,648.79
10-13	17729	5,588.64
10-14	17766	8,976.06
10-14	17783	2,624.54
10-14	17784	37,758.25
10-16	17807	8,819.97
10-17	17843	9,819.47
10-18	17882	237.43
10-18	17890	1,538.69
10-19	17921	13,191.62
10-20	17942	133,996.95
10-20	17955	3,990.20
10-21	17985	4,851.03
10-25	18075	18,917.45
10-25	18079	1,051.00
10-25	18089	9,006.06
10-26	18104	12,628.31
10-26	18118	3,512.77
10-27	18148	5,757.28
10-28	18176	21,757.69
10-28	18179	51,956.74
10-28	18201	4,275.51
10-30	18215	11,209.77
10-31	18247	7,476.18
10-31	18250	86.32
11-1	18285	2,623.53
11-1	18290	2,864.90
11-1	18303	32,932.45
11-2	18307	1,008.64
11-2	18312	8,971.54
11-3	18330	55,330.32
11-4	18356	6,000.00
11-4	18384	9,314.93
11-6	18387	2,500.00
11-7	18407	3,528.67
11-7	18420	15,538.16
11-7	18428	8,025.97
11-8	18444	2,683.63
11-9	18467	1,953.52

Date	Remittance No.	Amount of Cash
11-10	18480	829.55
11-13	18518	1,776.20
11-13	18538	4,307.12
11-14	18546	39,876.14
11-14	18556	7,026.72
11-15	18572	2,483.83
11-15	18581	3,480.33
11-16	18598	7,735.30
11-16	18616	3,469.31
11-17	18621	23,862.15
11-17	18624	16,872.15
11-17	18639	9,115.73
11-16	18657	28,908.20
11-18	18670	6,003.65
11-20	18702	82,831.08
11-21	18707	9,816.44
11-22	18732	1,426.34
11-22	18735	103,237.40
11-22	18746	7,649.40
66 11-23	18766	5,642.95
11-23	18772	4,437.14
11-24	18796	5,651.75
11-25	18840	399.58
11-28	18870	5,993.98
12-1	18938	3,246.73
12-4	18975	2,998.50
12-6	19023	3,316.25
12-7	19053	726.18

aggregating $933,837.57.

4. That as interest or compensation there was paid by the defendant to the intervening petitioner the sum of $3,277.65 on November 13, 1933.

5. That since their appointment and up to and including December 9, 1933 the receivers have collected the following accounts receivable theretofore assigned by the defendant to the intervening petitioner, to-wit:

Name	Amount
Midland Distributing Co.	$ 998.18
Star Electric Co.	4,816.70
Southwest Appliance Co.	812.33
Ignition Service Co.	2,000.00
Harry Moll, Inc.	1,000.00
D. P. Marris Co.	1,163.58

Name	Amount
Shaw Distributing Co.	2,661.53
Wadel-Connally Co.	403.52
Wadel-Connally Co.	163.31
R. S. Proudfit	3,386.15
Delta Hardware Co.	109.88
Fargo Glass & Paint Co.	1,374.35
J. P. Awalt Co.	1,380.24
J. P. Awalt Co.	413.88
Airo-Ola Radio Co.	3,000.00
McLendon Elec. Co.	706.05
Delta Hardware Co.	255.35
Cronin Co.	1,500.00
Jenkins Music Co.	702.91
State Radio Co.	6,000.00
W. B. Davis Co.	6,329.32
Wadel Connally Co.	436.69
McLendon Electric Co.	1,630.50
F. C. Hayer Co.	2,059.84
Transformer Corp.	1,588.57
Harbour-Longmire Co.	2,348.14
Ford Motor Co.	200.00
Gustafson Co.	406.90
Cronin Co.	2,500.00
J. A. White Co.	520.94
R. S. Proudfit	2,072.40
Chas. T. Naddy Co.	481.12
Pritzlaff Hardware Co.	667.77
Jenkins Music Co.	5,864.67
Howe & Co.	2,693.63
67 F. C. Hayer Co.	1,012.98
Schuster Electric Co.	1,217.17
H. D. Taylor Co.	4,800.00
Harbour-Longmire Co.	4,952.74
Crawford Co.	580.39
Ford Motor Co.	100,000.00
Protzlaff Hardware Co.	4,711.11
Ignition Service Co.	2,000.00
F. C. Hayer	1,178.79
Nashville Chair Co.	1,292.12
R. S. Proudfit	602.70
Fargo Glass Co.	1,306.96
Midland Distributing Co.	595.68

aggregating $186,919.09, which moneys, pursuant to an order

of this court, have been deposited by the receivers in a special account in the Continental Illinois Bank and Trust Company. That out of the above collections, a portion of the accounts have been assigned to Manufacturers and Dealers Finance Company, and there is due to them $1,803.88, leaving due to your petitioner the sum of $185,115.21.

6. That since their appointment as receivers, on, to-wit: November 24, 1933, up to and including December 9, 1933, said receivers have collected the said sum of $185,115.21 aforesaid on accounts theretofore assigned by the defendant to intervening petitioner, which sums of money they have retained in such special account and at Dec. 9, 1933, had not paid the same over to the intervening petitioner.

7. That the following accounts heretofore assigned by the defendant to the intervening petitioner were due and payable in the amounts and on the dates set after each debtor's name and amount and said accounts had not been paid on Dec. 9, 1933, either by the debtors or the defendant or the receivers, to the intervening petitioner, to-wit:

Invoice Date	Name	Due Date	Amount
10-16-33	Airola Radio Corp.	11-16-33	$ 2,757.67 Bal.
20		20	2,813.43
26		26	140.80
31		30	4,538.67
31		30	95.50
11- 1-33		12- 1-33	286.95
1	Capital Electric Co.	1	878.10
7	City Electric Co.	7	247.85
6		6	2,829.50
8		8	454.25
9		9	464.25
10-18-33	Cronin Co.	11-18-22	505.20
10-25-33	Cronin Co.	11-25-33	$ 4,893.98 Bal.
26		26	190.50
30		30	1,423.50
11- 2-33		12- 2-33	1,170.00
4		12- 2-33	841.50
4		4	795.00
8		8	354.25
9	Cummings & Emerson	9	105.20
7	W. B. Davis Elec. Supply Co.	7	337.45
4		4	2,540.65

Invoice Date	Name	Due Date	Amount
9		9	737.00
8		8	175.90
17	Electric Lamp & Supply Co.	9	3,000.00
9	Erie Radio Supply Co.	9	400.37
8		8	134.34
9	Erskine Healy Inc.	9	1,249.33
2	Goodyear Service Inc.	2	129.48
3		3	388.44
4		4	86.32
7		7	86.32
7		7	86.32
5	E. J. Gustafson Co.	5	415.20
10–20–33	Hamburg Bros.	11–20–33	1,382.50
20		20	88.00
24		24	3,702.10
24		24	4,795.96
30		30	509.60
30		30	4,765.31
31		30	3,021.00
11– 1–33		12– 1–33	1,129.00
1		1	4,336.79
1		1	2,796.00
1		1	109.00
8	Harbour Longmire Co.	8	2,396.06
9	D. P. Harris Hdwe. & Mfg. Co.	9	465.95
9	F. C. Hayer Co.	9	2,102.90
5	Howe & Company	5	236.28
7		7	1,014.00
4		4	1,875.50
9 –25–33	Ignition Service & Supply Co.	10–25–33	3,898.73 Bal.
10–23–33		11–23–33	2,695.00
25		25	257.30
25		25	430.00
27		27	4,031.45
27		27	1,957.75
30		30	1,664.45
11– 8–33	Kimball Upsom Co.	12– 8–33	119.75
2	Majestic New York, Inc	2	500.75
3		3	89.56
4		4	877.91

	Invoice Date	Name	Due Date	Amount
	8		8	9,568.81
	8		8	789.20
	11- 8-33	Majestic New York, Inc.	12- 8-33	3,680.16
	8		8	234.50
	8		8	1,308.15
	10-19-	Midland Distrib. Co.	11-19-33	998.18
69	10-20-33	Midland Distributing Co.	11-20-33	289.86
	23		23	305.82
	26		26	424.26
	27		27	521.40
	30		30	114.09
	11- 1-33		12- 1-33	507.72
	10- 6-33	Midwest Timmermann Co.	11- 6-33	1,314.35
	6		6	2,240.60
	5		5	247.28
	5		5	1,131.60
	5		5	19.90
	5		5	107.50
	11- 1-33		12- 1-33	281.60
	2		12- 2-33	1,050.19
	2		2	1,360.44
	3		3	310.55
	3		3	2,544.02
	10-17-33	Harry Moll, Inc.	11-17-33	3,072.05
	19		19	3,756.10
	21		21	1,068.00
	21		21	236.30
	26		26	105.72
	26		26	373.80
	10-31-33		30	2,871.06
	11- 2-33		12- 2-33	136.90
	2		2	2,598.17
	2		2	274.10
	2		2	2,598.17
	2		2	274.10
	3		3	3,279.04
	10-12-33	Monroe Auto &Supply Co.	11-12-33	1,225.08
	18		18	700.43

	Invoice Date	Name	Due Date	Amount
	9–30–33	Chas. T. Naddy Co.	10–30–33	2,560.10
	10– 5–33		11– 5–33	22.85
	14		14	2,640.15
	20		20	187.39
	21		21	500.75
	26		26	140.80
	27		27	740.81
	31		30	1,891.60
	11– 4–33	North Coast Electric Co.	12– 4–33	662.50
	4		4	605.20
	9		9	250.75
	10–17–33	Peirce Phelps Inc.	11–17–33	7,127.68
	17		17	3,566.25
	18		18	626.71
	19		19	6,535.00
	20		20	156.62
	24		24	281.60
	25		25	268.75
	26		26	422.47
	26		26	4,112.50
	30		30	373.80
	31		30	233.00
	11– 2–33		12– 2–33	206.53
	3		3	222.50
	4	R. S. Proudfit Co.	4	452.95
	9	Radio Equipment Co.	9	102.01
	6	The Schuster Elec. Co.	6	912.70
	4		4	2,917.60
	8		8	600.15
	9		9	698.75
70	11– 1–33	Shaw's Inc. Shaw Dist. Co.	12– 1–33	120.00
	2		2	515.03
	3		3	742.60
	4		4	2,964.00
	5		5	198.90
	4		4	871.45
	6		6	928.50
	10–30–33	Southwest Appliance Co.	11–30–33	680.31
	11– 1–33		12– 1–33	720.84

Invoice Date	Name	Due Date	Amount
2		2	1,409.14
4		4	297.14
4		4	243.18
2	Star Elec. & Engineering Co.	2	207.50
3		3	1,304.71
5		5	1,229.25
7		7	1,146.95
1	State Radio Co.	1	3,632.37
1		1	349.50
3		3	3,953.75
7		7	1,286.50
8		8	982.70
2	Stern & Co. Inc.	2	2,653.98
2		2	98.34
4		4	3,700.82
5		5	3,882.81
4		4	585.66
1	H. D. Taylor Co.	1	1,315.74
1		1	1,532.70
2		2	230.52
3		3	1,827.69
10		7	1,000.00
10–28–33	Thompson & Holmes Inc.	11–28–33	11,343.73 Bal.
11– 6–33		12– 6–33	266.00
9–28–33	Toledo Majestc Inc.	10–28–33	1,254.92
29		29	202.80
10– 6–33		11– 6–33	2,895.57
5		15	55.40
9		19	1,614.95
13		13	2,233.10
25		25	565.96
25		25	102.92
30		30	1,222.89
11– 3–33		12– 3–33	1,940.20
3		3	877.50
10– 6–33	Transformer Corp. of America	11– 6–33	129.00
5		5	507.50
9		9	1,264.00
11		11	216.50
16		16	178.50

Invoice Date	Name	Due Date	Amount
27		27	525.50
27		27	236.00
30		30	242.40
31		30	502.85
11– 1–33		12– 1–33	514.15
2		2	659.60
3		3	538.75
9	Jos. M. Zamoiski Co.	9	1,339.42
	Total		$247,721.26

71 8. That until November 23, 1933 the intervening petitioner has delivered to said defendant in final payments, the sum of $430,125.55.

9. That the rate of compensation or interest fixed by the contract "Exhibit A", aggregates twenty per cent per annum.

10. That prior to the appointmen of the receivers herein it was the custom and practice between the defendant and the intervening petitioner for the defendant to deliver to the intervening petitioner schedules of accounts receivable and assign the same to the intervening petitioner, and the intervening petitioner having checked the credit risk, or being satisfied with the risk, of the debtor customers, would immediately transmit its check for fifty per cent of the face value of the accounts to the defendant. When the defendant received payment from its customers it transmitted each payment in its original form to the intervening petitioner. The intervening petitioner would endorse and deposit the remittances thus received and would remit to the defendant the balance of the face value of the accounts not already advanced, i. e. fifty per cent (termed final payments) less any deductions, and plus any overpayments by the respective debtors.

12. That no accounts receivable were assigned by the defendant to the intervening petitioner after November 24, 1933.

13. That LeRoi J. Williams and Thomas L. Marshall were appointed receivers of Grigsby-Grunow Company by the United States District Court for the Northern District of Illinois, Eastern Division, on November 24, 1933 and subsequent to their appointment have refused and still refuse to pay over any moneys collected on accounts assigned by the company to the intervening petitioner until directed to do so by the court.

14. That on December 5, 1933, the intervening peti-
72 tioner notified the following named debtors that it purchased of the defendant and held and owned trade ac-

ceptances executed by such debtors maturing and in the amounts as follows:

Name	Amount	Due
Lewis Furniture Company (Airola Radio Corp.)	$ 400.00	12-19-33
	400.00	1-19-34
	1000.00	2- 3-34
	800.00	1- 6-34
Capital Electric Company	4,767.75	12-15-33
	4,767.70	12-25-33
	4,767.70	1-12-34
The Cronin Company	1,000.00	12-11-33
	1,000.00	12-18-33
Electric Lamp & Supply Co.	2,200.48	12-18-33
	3,000.00	12- 9-33
Harbour Longmire Co.	5,000.00	12-14-33
North Coast Electric Co.	4,071.20	12-15-33
	4,071.20	12-26-33
Otis Heddin Company	7-106.09	12-20-33
The Schuster Electric Co.	1,000.00	12-10-33
Southwest Appliance Company	2,182.65	12-10-33
	1,091.23	12-10-33
	1,091.22	1-10-34
State Radio Company	7,500.00	12-10-33
H. D. Taylor Company	1,000.00	12- 7-33
	2,430.00	12-12-33
Midwest Timmerman Company	10,000.00	12-16-33
	5,000.00	12-16-33
	10,000.00	12-27-33
Total	$85,647.22	

after first advising the receivers that the intervening petitioner intended to give such notice and procuring the receiver's consent thereto.

15. That if the court determines that the rate of compensation or interest is proper, then that such rate of compensation or interest owing to the intervening petitioner up to and including December 9, 1933, is $6,697.12 and thereafter continues at the rate of 83½% of 1/30 of 1% per day of the net face amount of accounts from December 10, 1933, until paid to the intervening petitioner.

73 16. That on December 14, 1933, pursuant to an order entered of record by this Honorable Court, upon the petition of the receivers herein, out of such special account the

receivers were directed to deliver to the petitioner the sum of $140,000 on account, which sum they afterwards delivered as ordered.

17. That on December 22, 1933, pursuant to an order entered herein, upon the petition of the receivers, the receivers were directed to deliver to the petitioner out of such special account the sum of $36,159.30, which sum was delivered as ordered and for which amount the petitioner returned to the receivers herein accounts receivable aggregating approximately said amount.

18. That the petitioner collected certain trade acceptances and the total amount of such collections is $83,538.30.

19. That on December 29, 1933 the receivers paid the petitioner $10,003.18 and the petitioner returned to the receivers the trade acceptance of Midwest Timmerman Company of Dubuque, Iowa, for approximately said amount.

20. That all advances by the petitioner to the Grigsby-Grunow Company have been returned to petitioner, together with compensation or interest at the contract rate up to November 24, 1933; that no compensation or interest has been paid to petitioner since November 24, 1933 by the receivers; that compensation or interest at the contract rate from November 24, 1933 to December 29, 1933 amounts to $4,394.48; that interest at the rate of 7% per annum for said period amounts to $1,087.93.

21. That on December 1, 1933 the receivers herein
74 filed a petition with reference to advertising, a true and correct copy of which is attached hereto and made a part hereof as Exhibit C, and that, pursuant to said petition, an order of this court was entered, a true and correct copy of which is attached hereto and made a part hereof as Exhibit D.

22. That since the appointment of the receivers herein the receivers have collected on the accounts assigned to the intervening petitioner a sum in excess of $350,000; that these collections were made by the receivers at their expense and that the intervening petitioner did not render any services or incur any expenses in connection with the said collections except with reference to forwarding in the ordinary course of business the trade acceptances hereinabove described in the amount of $83,538.30. The receivers did not request the intervening petitioner to render any services in connection with the collection of the said accounts.

23. No notice of the assignment of the accounts was given to the various debtors except as hereinabove set forth.

24. Both parties reserve the right to offer additional testimony on the trial hereof.

Dated at Chicago, Illinois, December 29, A. D. 1933.

RATHBART & LEWIS
Attorneys for Manufacturers Finance Company, a corporation, Intervening Petitioner
THOMAS L. MARSHALL
LE ROI J. WILLIAMS
By THOMAS L. MARSHALL
Receivers

75 SCHEDULE "A".

Contract. ..... Date 10/5 1933 Agent.....

Between

Name Grigsby-Grunow Company Address Chicago, Illinois

And

MANUFACTURERS' FINANCE COMPANY
Baltimore, Md.

Articles of Agreement entered into at Baltimore, Maryland,, this 5th day of October, 1933, between Grigsby-Grunow Company of Chicago, Illinois herein designated as first party, and Manufacturers' Finance Company, a Delaware corporation, its successors or assigns, hereinafter designated as second party.

Witnesseth, That Whereas the first party is desirous of obtaining the advantages of the services offered by the second party, which the second party hereby undertakes to perform, and desires to sell to the second party accounts receivable, notes, drafts, acceptances, leases, mortgages, contracts and choses in action, hereinafter designated "accounts," evidencing sales and deliveries of personal property usually dealt in by the first party.

Now Therefore, in consideration of the premises, the parties hereby agree as follows:

First: Second party agrees to buy such accounts belonging to first party as may be acceptable to second party and to par therefor:

One hundred per cent. (100%) of the actual net amounts thereof, less charge equal to the legal rate of interest on the purchase money outstanding during the period it is outstanding, and less the compensation and reimbursement of the second party as provided in Paragraph Fourth of these Articles of Agreement, of which Fifty per cent. (50%) of the actual

net amount thereof shall be paid in cash upon acceptance of such accounts by the second party, and the remaining Fifty per cent. (50%), less any deductions and plus any over payments by the respective debtors, and less the said compensation and reimbursement of the second party as provided in said Paragraph Fourth hereof, shall, in the case of each such account, be paid to the first party immediately upon payment of such account to the second party; provided however, that no payments of any such remainder need be made by the second party, so long as any account or accounts purchased by the second party from the first party shall be in any manner affected by any breach or violation of any warranty of the first party herein, but such remainder and any moneys accounts or property of the first part which may come into the possession of the second party whenever and however coming into such possession may be by it held and thereafter applied to the payment of any such accounts.

Second: In order to avoid objections by, and any possible loss of trade from, any of its customers through second party collecting the said accounts direct from the debtors, and to obtain from second party the right and privilege which is hereby given, to make collections at the office of first party of all accounts sold to second party, first party will pay second party for the salaries and all expenses of travel of auditors of second party, who shall have the right to call every thirty (30) days, or oftener, and inspect, audit, check and make extracts from the books, accounts, records, orders, original correspondence and other papers of first party relating to accounts sold hereunder, as provided in any bond which may be obtained by second party, or as required and directed by second party; said right and privilege of first party may be terminated by second party at any time, and shall terminate immediately upon the suspension of business, request for general extension, bankruptcy petition, or any act amounting to a business failure by or against first party. First party warrants and agrees that it will transfer or deliver to second party at its office in Baltimore, Maryland, on the day of the receipt thereof, all original checks, drafts, notes and other evidences of payment received in payment, or on account, or any accounts purchased hereunder by second party.

Third: The second party agrees to perform the following services for the first party:

1. To furnish by mail to the first party its credit information in hand about the customers of the first party, upon request of the first party.

2. Have its auditors give to the first party the report of each examination herein provided for, with full information and advice as to the most desirable method of keeping the books, records and accounts of said first party.

3. Pay for all accounting, postage and credit investigations of accounts purchased or offered for purchase hereunder, and upon request give financial and business advice.

4. Accept as par, less exchange, subject to payment, all remittances received through first party ~~*and pay all costs of exchange thereon on points within the United States of America.*~~

5. Obtain and have on hand at all times, sufficient funds to make prompt remittance to first party for all acceptable accounts within the limits herein agreed upon.

6. Supply all forms needed for assignment of accounts hereunder.

7. Place their credit department and collection department at the disposal of first party and permit first party to submit any of its sales contracts with its customers to the general counsel of second party for advice and opinion as to form and legality thereof.

Fourth: In consideration of the foregoing, the first party agrees to pay the second party, as and for its total compensation for the obligation to render and/or the rendering of all services and other considerations herein set forth, an amount which reduces the purchase price of accounts hereunder, and which, added to the charges mentioned in the first and second paragraphs of this Agreement, shall be equal to Eighty-three one-half percent (83½%) of One-thirtieth of one per cent. (1/30 of 1%) of the net face amount of accounts for each day from the date of purchase by, until paid to, second party, ~~*plus Five Dollars ($5.00) per One Thousand Dollars ($1,000.00) on the First One Hundred Thousand Dollars ($100,000.00) of accounts purchased within any twelve (12) successive months' period. Subject to an additional charge of 1/5 of 1% on the face of all accounts purchased hereunder.*~~

Fifth: In consideration of the prompt purchase of, and remittance for, accounts acceptable to it, by second party without delaying to make a complete credit investigation thereof, first party hereby warrants to second party as follows:

1. That first party and each debtor named in an account is solvent and will remain so until the maturity thereof;

2. That there will be no suspension of business, request for general extension, bankruptcy petition, appointment of

receiver, assignment for benefit of creditors or any other act amounting to a business failure by, or against, first party or any debtor;

3. That every account purchased hereunder and every settlement received thereon will be paid in full at maturity;

4. That no debtor named in an account will object to the payment for, or the quality or quantity of, the property evidenced by such account, nor fail nor refuse to accept, receive and retain, nor re-consign any or all of such property;

5. That first party will not sell or assign any of the accounts of said first party elsewhere without first giving ten (10) days' written notice to second party of such intention;

6. That prompt payment will be made to second party of the net invoice value of any goods returned, rejected, re-sold, re-routed in transit or of any allowance or credit upon any account sold to second party;

7. That each account offered for sale to second party shall represent a bona fide sale and delivery of property usually dealt in by first party, and shall be for a certain, undisputed, liquidated claim or demand, which is due or to become due on the dates set forth.

Sixth: If any warranty, expressed or implied, made herein or resulting from the provisions hereof, with respect to any account, or made in, or resulting from, the provisions of the assignment of any account to second party, or from the subject matter hereof, shall be broken or violated, whether through the act of the first party, or of others, the damages which the second party shall be entitled to recover from first party as a result thereof, shall include all attorneys' fees, court costs and all other expenses which may be expended or incurred by second party to obtain or enforce payment of any account purchased hereunder, either against the debtor, first party, or any of its guarantors, or sureties, or in the prosecution or defense of any action or concerning any matter growing out of or connected with the subject-matter of this contract and accounts purchased thereunder. Waiver by second party of any breach hereunder shall not be construed to act as a waiver of any subsequent breach. Granting extensions to or adjustments of claims of debtors named in accounts purchased hereunder, compromises, compositions of settlements of such accounts either with the debtor or others, or the sale, assignment or transfer of accounts hereunder by second party shall not affect the liability of first party under any of its warranties as herein provided. Failure to obtain the execution and delivery of the guaranty and/or bond printed on

this form shall not affect the validity of these articles of agreement.

Seventh: It is agreed that, contemporaneously with the purchase of accounts hereunder, first party will, by proper instruments in writing, assign and set over, to second party such accounts, purchased by it as aforesaid, to the end that second party may be and become subrogated to all of the rights, securities or guarantees, possessed by the first party in respect thereto, including the right of stoppage in transit; should the latter right be exercised, or should the debtor named in such account fail or refuse to receive, accept or retain, or return, the properaty evidenced by such account, or should said property be re-routed or reconsigned, then the title to said property or property exchanged therefor, 76 with the right to sell or otherwise dispose thereof, and the title to any new account created through the resale thereof, shall be and remain in said second party; and first party will deliver said property and assign said accounts to second party or will hold the same in trust for and subject to the orders of second party, and upon request by the second party will purchase and pay for said property at the net invoice value thereof. Each such purchase and assignment of accounts hereunder shall constitute and be a transaction separate from and independent of each other such purchase and assignment, but all such purchases and assignments shall be subject to, and governed by, each and every of the provisions of these Articles of Agreement.

Eighth: Immediately upon consummation of the purchase by second party of accounts as aforesaid, first party agrees to make upon its books suitable and proper entries disclosing the absolute sale of said accounts to second party, and to execute and deliver to second party any and all instruments, and to do any and all things necessary, proper and convenient to carry into effect the terms, provisions and conditions of these Articles of Agreement or to facilitate the collection of accounts purchased hereunder.

Ninth: The first party does hereby make, constitute and appoint V. G. Dunnington or Walter D. Focke or either of them, or any other person whom either of said Dunnington or Focke or second party may designate, its true and lawful attorney, with power to receive, open and dispose of all mail addressed to first party; to endorse the name of first party upon any notes, checks, drafts, money orders or other evidences of payment or collateral that may come into the possession of second party as payment of or upon accounts pur-

chased by it from first party as aforesaid, to endorse the name of first party upon any invoice, freight or express bill or bill of lading relating to any such account; to sign the name of first party to drafts against debtors, to assignments and verifications of accounts and notices thereof to debtors; and to do all other acts and things necessary or proper to carry out the purposes of this agreement.

Tenth: It is expressly understood, and it is a condition of the making of these Articles of Agreeement, that the purchase by second party of accounts, as herein provided, and the payment of the consideration therefor is made upon representation in writing concerning the financial responsibility of first party, which said first party agrees to make and deliver upon request to second party, from time to time, and not less, in any event, than once in each calendar year.

Eleventh: It is expressly understood that neither of the parties hereto shall be bound by anything, not expressed in writing by and between the parties. It is expressly agreed that second party may from time to time add to, alter, cancel or in any manner change any of the agreements, terms, provisions, and conditions of these articles, by a notice of such changes to first party by registered mail, addressed to first party at first party's address as it appears on second party's books; if first party shall not dissent in writing to second party, within five days from the receipt of such notice of such changes, they shall become and be a part of these articles to all intents and purposes as fully as though herein fully set forth, and shall become and be fully binding on first party, all guarantors of these articles and all sureties upon all bonds given to secure the performance of these articles, without any other or further notice to any person or persons whatsoever. As the second party is a Delaware corporation it is further expressly agreed that these articles and all acts, transactions, agreements, certificates, assignments and transfers hereunder, and all rights of the parties hereto, shall be governed as to their validity, enforcement, interpretation, construction, effect and in all other respects, by the laws and decisions of the State of Delaware.

This agreement and all of its provisions shall inure to, and become binding upon, the heirs, executors, administrators, successors and assigns of the parties hereto.

The first party hereby waives all notice of any matter to which it might otherwise be entitled and also waives presentments, demand and protest of any note, draft or other evidence of payment, and either party hereto shall have the right

at any time upon written notice to cancel this agreement as to future transactions.

This agreement shall not become effective until accepted by two duly authorized officers of second party at Baltimore, Maryland.

In Witness Whereof, the parties hereto have caused these presents to be executed on the day and year first above written.

GRIGSBY-GRUNOW COMPANY (Seal)
By LEROI J. WILLIAMS (Seal)
Vice President.

Attest:
W. A. MONROE,
Witness.

Accepted by Manufacturers' Finance Company at Baltimore, Maryland this 5th day of October 1933.
By H. C. BENSON *Treasurer.* By W. H. JONES *Vice-President.*

Know all men by these presents, that

Grigsby-Grunow Company of Chicago, Illinois hereinafter called Principal, and G. B. Whitfield of Chicago, Ill., and ..... of ....., hereinafter called Sureties, are held and firmly bound unto Manufacturers' Finance Company, a Delaware Corporation, hereinafter called Obligee, in the full and just sum of One Hundred Thousand Dollars ($100,000.00), to the payment whereof well and truly to be made, we bind ourselves, our and each of our heirs, personal representatives, successors and assigns, jointly and severally, firmly by these presents, sealed with our seals, this 5th day of October 1933.

Whereas, the Princilal and Obligee have entered into Certain Articles of Agreement, hereinafter called Agreement, which is upon the inside pages hereof and is to be taken as part hereof, for the sale of accounts receivable by the Principal to the Obligee; and

Whereas, It is the purpose hereof that this obligation shall be deemed a continuing security in respect to all accounts which hereafter may be assigned by virtue of said Agreement; and

Whereas, the Principal may receive, under said Agreement, checks, drafts, notes and other evidences of payment or property (including merchandise returned), and may also have under control merchandise in transit.

Now, therefore the condition of the foregoing obligation is

such that if the Principal shall transfer and assign only valid accounts to the Obligee, and shall well, truly and faithfully pay over to the Obligee any and all checks, drafts, notes and other evidences of payment and all properties (including merchandise returned) received by the Principal on such assigned accounts, and shall in all other respects, fully, promptly and faithfully pay, perform and discharge each and every of the agreements, terms, provisions and conditions of said contract, of any and all changes therein and of any rider or riders to be attached thereto or of any other instrument or instruments given or executed in pursuance thereof, then this obligation shall be void, otherwise it shall remain in full force and virtue in law.

The foregoing obligation is subject to the following conditions, to wit:—

1. The Obligee shall require the Principal to state in writing at the time of assigning each account the date when the payment of each account is due.

2. The Obligee shall require the Principal to file with Obligee in connection with all accounts purchased, a certificate, signed by a responsible official or employee of the Principal, that the accounts referred to in the certificate are undisputed and represent bona fide sales and deliveries; that there are no off-sets, contra accounts or counter claims of any nature whatsoever against any of them, that none of them are then past due and that proper entries have been made on Principal's books disclosing the absolute sale thereof to Obligee, its successors or assigns.

3. The Obligee, at least, bi-monthly, shall cause to be made examination of the accounts of the Principal which shall embrace:

(a) A complete examination of the books, accounts and vouchers of the Principal as respects the accounts purchased under the said Agreement;

(b) A careful comparison between all such unpaid purchased accounts as they appear on the records of the Obligee and as they appear in the books of original entry of the Principal.

4. The Obligee shall not be required to prosecute any suit or proceeding against the Principal upon said Agreement as a condition precedent to recover under the provisions hereof.

5. Sureties waive and postpone any and all claims of every kind and description that they or either of them may now, or hereafter, have against Principal, in favor of, and to, the payment to Obligee of any and all claims of every kind and de-

scription that Obligee may have against Principal, whether arising under Agreement or in any other manner.

6. Principal and Sureties waive notice of any and all purchases and assignments of accounts and all defaults by any one in that behalf, and waive notice of acceptance of this bond by second party, and waive all other notices to which they might otherwise be entitled.

7. Principal and Sureties agree to be fully bound by any and all changes in agreement in accordance with its terms, without notice thereof of any kind.

8. As the obligee is a Delaware corporation this bond and all acts and transactions hereunder, and all rights of the parties hereto, shall be governed, as to their validity, enforcement, interpretation, construction, effect and in all other respects, by the laws and decisions of the State of Delaware.

In Testimony Whereof, Principal and Sureties have hereunto set their hands and seals.

GRIGSBY-GRUNOW COMPANY, (Seal)
By LEROI J. WILLIAMS (Seal)
Vice President.
G. B. WHITFIELD (Seal)

Signed, Sealed and Delivered
in the presence of
W. A. MONROE

Certificate of Suretyship

The Indemnity Insurance Company of North America in consideration of an agreed premium hereby adds the above Seller of Accounts Receivable to jt Automatic Position Schedule Bond No. 147, issued on September 30, 1921, in favor of the Manufacturers' Finance Company, by which the Indemnity Insurance Company of North America guarantees the Manufacturers' Finance Company, against any direct loss in accordance with the terms, provisions, and conditions of said bond.

Signed, Sealed and Dated this 5th day of October 1933

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA
By .....

77 Schedule "B"

Triplicate Certificate of Indebtedness

This is to Certify that the persons named below are indebted to the undersigned in the sums set opposite their respective names, for goods sold, shipped and delivered.

Number M 8770

Certificate	100%	6455.08
Reserve	50%	3227.54
Check	50%	3227.54

Date of Invoice Mo.	Day	Name of Debtor	Address	B	Due Date Net Cash Mo.	Day	Amount of Invoice Net
10	4	Ford Motor Co.	Dearborn, Mich.		11	20	1,591.49
10	4	" " "	"	"	11	20	1,611.29
10	4	" " "	"	"	11	20	2,760.58
10	4	" " "	"	"	11	20	491.72
		Totals or Amounts Carried Forward					6,455.08

Dated at Chicago this 7 day of October 1933

In consideration of Five Dollars ($5.00) and other valuable considerations, receipt of which is hereby acknowledged, the undersigned hereby sells, assigns and sets over to Manufacturers' Finance Company, its successors or assigns, all its right, title and interest in and to the open accounts and contracts above named, represented by invoices and shipping documents delivered herewith, aggregating Six thousand four hundred Fifty-five and 08/100 Dollars ($6,455.08), including all moneys due and to become due upon the same and absolute title to the merchandise represented thereby, including all merchandise returned, rejected or reconsigned, together with the right of stoppage in transit.

The undersigned represents that the above schedule correctly sets forth undisputed open accounts and contracts now owing the undersigned for bona fide sales and deliveries of merchandise in accordance with specifications of the buyer; that there are no offsets, contra accounts or counter claims of any nature whatsoever against any of them; that none of said open accounts and contracts are now past due; and that proper entries have been made on its books disclosing the absolute sale thereof to Manufacturers' Finance Company, its successors or assigns.

The undersigned further represents that all remittances received or credits allowed by it upon any and all open accounts

and contracts previously sold or assigned to Manufacturers' Finance Company have been duly, properly and regularly entered to the credit of the accounts of the respective customers on the books and records usually used for such purpose; that all such remittances have been promptly forwarded to Manufacturers' Finance Company; and that none of said open accounts and contracts have been sold or assigned to any other party.

The undersigned hereby acknowledges receipt from Manufacturers' Finance Company of the above open accounts and contracts for collection only, under the Agreement existing with Manufacturers' Finance Company. Upon demand by Manufacturers' Finance Company, its successors or assigns, the undersigned, for value received, agrees forthwith to pay to Manufacturers' Finance Company, Purchaser, all damages incurred or suffered by Manufacturers' Finance Company, and payable under the existing agreement between the seller and purchaser, by reason of, or due to, the breach or violation by the seller of any of the warranties in said contract contained, affecting any and all of the above assigned open accounts and contracts.

The open accounts and contracts hereinabove set forth are hereby purchased and paid for by Manufacturers' Finance Company upon the faith of each of the above representations of the undersigned; and the same are sold and purchased pursuant to and in accordance with the terms of the existing contract between the seller and purchaser, to which reference is hereby made.

Accepted by Manufacturers' Finance Company at Baltimore, Md., October 9, 1933.

Signed GRIGSBY-GRUNOW COMPANY
G. B. WHITFIELD,
Asst. Treas.

78 EXHIBIT C.

* * (Caption) * *

PETITION.

Your petitioners, Thomas L. Marshall and LeRoi J. Williams, temporary receivers appointed by order of this Court, respectfully represent that since their appointment November 24, 1933, they have paid under the orders of this Court the accrued and current payrolls, excepting some returned

salary checks for which funds are ample, and have continued to operate the business, including the manufacture and sale of products, with other activities in connection therewith. Three propositions upon which your petitioners must act immediately are presented herewith with request for specific authorization and order of the Court relative thereto.

1. Transfers of capital stock.

Transfers of certificates of common stock of Grigsby-Grunow Company, listed both on the New York Stock Exchange and on the Chicago Stock Exchange, involve expenses in considerable amounts, now estimated at $1400 per month. Such expenses, at periods in the past, have amounted to a monthly sum many times that figure. Your petitioners have so far incurred no such expense and consequently during the past six days there has been a considerable accumulation of certificates of stock for transfer. The New York Stock Exchange has threatened immediately to delist the stock unless provision is made for continuation of transfers as in the past. While it has been urged upon your petitioners that some element of goodwill of the business is involved, and it has been stated to your petitioners that it is undesirable at
79 the present time to disturb in any way the relationship to the trade and to the distributors and to the public buying radios, your petitioners are by no means clear that there is any real relationship between the market price of the stock on the Exchanges and the value and marketability of radios and refrigerators.

The request of stockholders for continuation of the expense of transfer for some reasonable period during which time the stockholders might formulate plans to finance continuation of the listing and the transfer, if such continuation be desirable to them, cannot be said to be an unreasonable request.

However, in view of the pendency of a bankruptcy petition, your receivers are not inclined to recommend this expense, which, in their opinion, is rather remote to conservation of assets and goodwill.

2. Advertising.

The original plans of the Company for advertising during the month of December, 1933 included Saturday Evening Post advertising to the extent of one double page and three additional pages, and involved a gross expenditure of $100,000 of which $35,000 was in the Saturday Evening Post and $65,000 in newspaper advertising. Prior to the receivership this entire schedule of advertising was cancelled with the

exception of the double page in the Saturday Evening Post which was released several weeks prior to the receivership and which had been printed prior to the receivership and your petitioners have not recognized any liability as a receivership expense for the cost of such double page, to-wit: $14,000.

There still remain in the hands of distributors 43,629 radios, in the hands of dealers 21,000 radios and in the hands of the factory 13,000 radios and an additional number of 22,000 partially completed, and all of such merchandise should be cleared prior to January when new models will be produced.

It is believed that a reasonable amount of advertising is essential in order to move such goods. Successful operation of the receivership as a going concern could not countenance dumping of the merchandise either by dealers, distributors or by the factory and such a result has not so far happened.

Of the foregoing radios, substantially the entire amount of 64,000 sets in the hands of distributors and dealers are represented by accounts receivable, and by and large the ability of the dealer and the distributor to sell them determines the soundness of the account. The accounts receivable aggregate approximately $1,500,000 of which approximately 70% represent accounts owed by the distributors directly to the Company. There is involved therefore, not only the building up of sales volume for December and for the future, but also the integrity of the present accounts receivable.

Some forty distributors assembled in Chicago November 28, 1933 and in a meeting urged upon the receivers that a conservative advertising appropriation be made for immediate newspaper advertising in the 52 centers of the United States involved. The reasons for this request were preservation of the goodwill of the business, furthering of the moving of merchandise from dealers' and distributors' stores and warehouses, and fundamentally the building up of a foundation for the new lines in January and, above all, the immediate showing to the public that the Majestic radios and refrigerators are not out of business and can still be bought with assurance that the business is being maintained and will be maintained.

The sales manager of the Company was continued in the employ of the receivers and recommends that this figure for newspaper advertising be fixed at a maximum of $35,000 with discretion of the receivers to reduce such aggregate sum if eventualities should require.

We quote from the letter of the sales manager addressed to the receivers:

"To summarize the foregoing recommendation, I can only add that the action on the part of the receivers, in permitting the expenditure of $35,000 for newspaper advertising in the month of December, assured continuity of operations on the part of 12,000 dealers in the United States. Further, that this advertising will be complete evidence to those dealers that it is the intention of the receivers to operate this
81 company and to reorganize it on a basis that will assure all of those interested in our product that Majestic is a permanent proposition. Further, it will eliminate, from the minds of the retail buyer, any apprehension as to the advisability of buying our product at the regular prices.

Without this advertising, we cannot anticipate that it will be possible to hold together this large group of dealers and distributors who are dependent upon us and our cooperation to assist them in capitalizing the December market. They have purchased this large quantity of merchandise on the basis that there would be substantial advertising. Without it, faith will be completely destroyed."

The distributors at their meeting, without mentioning any specific sum, made it clear to the receivers that in their opinion such action was essential for the successful moving of the merchandise and to preparing for the new lines, and also that it would assure their ability to meet the accounts receivable now owing to the Company, and that without such an appropriation and without the action covered by paragraph 3 hereof, it is questionable whether a substantial amount of the accounts receivable could or would now be paid. Your petitioners are disposed to recommend that they be authorized to expend not to exceed $35,000 for such purposes.

3. Another matter forcefully presented by the distributors to the receivers at the meeting of the distributors on November 28, 1933 is the matter of warranties, upon refrigerators heretofore sold by the Grigsby-Grunow Company.

Some 200,000 refrigerators have been sold with a replacement warranty, the sales for the most party having been by the Company to the distributors, by the distributors to the dealers, and by the dealers to the consumer. The distributors and dealers, and to some extent the Company obligated themselves upon finance company paper involved in installment plan sales of refrigerators. In the event of failure of the Company to live up to the warranty, the customer will

likely default upon installment payments. Many of these warranties were for a period of three years. The warranty period is still in effect upon a large number of the sales made.

Distributor and dealer goodwill would be seriously impaired should the receivers not go ahead with the warranty obligations, and furthermore the integrity of the existing ac-
82 counts receivable would be seriously impaired by the holding back upon the part of the distributors of reserves to cover the direct or contingent liability assumed by them through their own warranties or through their signature or guaranty of installment paper.

Your petitioners were requested by the distributors at said meeting to assume without qualification all such warranties. Your petitioners replied that such an assumption would have no validity beyond any period of receivership and that as a practical matter the continuance of the refrigerator business and perhaps continuance even of the radio business would necessarily involve a keeping up of these obligations by the receivers or by any person who, upon reorganization or sale, would succeed to the business.

Your petitioners find that according to the present estimates the expenditures on account of such warranties during the month of December would normally amount to approximately $10,000 and that a very small part of that sum represents cash outlay, since the refrigerators and parts are to a large extent in the inventory of the factory. At some months of the year the figure has risen very substantially above the sum of $10,000, the peak being in the summer months.

Your petitioners recommend that they be authorized and directed to maintain until further order of the Court full compliance with such warranties.

As to the request made by your petitioners in paragraph 3, your petitioners have no doubt whatsoever as to their recommendations. As to the provisions of paragraph 2, your petitioners are in doubt only as to the amount, and it is believed that if the order should be entered placing the maximum, that some discretion may be exercised depending upon eventualities. Your petitioners are clear that both preservation of the goodwill of the business and its operation as well as the preservation of the free accounts receivable and the equity in pledged accounts require their action under both paragraph 2 and paragraph 3.

THOMAS L. MARSHALL (Signed)
LEROI J. WILLIAMS (Signed)
Receivers herein.

83 State of Illinois }
County of Cook } ss.

THOMAS L. MARSHALL and LEROI J. WILLIAMS, being first duly sworn, on their respective oaths depose and say that they have read the above and foregoing petition by them subscribed, know the contents thereof, and that except figures therein stated are approximate the same is true.

THOMAS L. MARSHALL (Signed)
LEROI J. WILLIAMS (Signed)

Subscribed and sworn to before me this 1st day of December, A. D. 1933.

HELEN HILL
Notary Public.

84 * * (Caption) * *

ORDER.

This cause coming on to be heard upon the verified petition of Thomas L. Marshall and LeRoi J. Williams, receivers herein, (which petition requests instructions and order respecting three special matters regarding operation of the business) after notice to all parties, and no objection appearing thereto, and the court having examined said verified petition and being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed that the receivers are hereby authorized:

1. To discontinue the expense of the transfers and reissues of certificate or certificates of capital stock of Grigsby-Grunow Company, and the receivers are directed forthwith to inform the Grigsby-Grunow Company of such order, and the receivers shall present their recommendations as to practicable procedure for facilitating such transfers under a plan whereby the stockholder presenting a certificate for transfer or reissue shall pay the cost of such transfer or reissue.

2. In the operation of the business, to expend from the assets of the receivership estate for further advertising during the month of December 1933 the sum of $35,000.

3. To continue replacements and performance of other obligations of Grigsby-Grunow Company under the warrants of such company which have been given in connection with the sale of refrigerators.

Enter:

BARNES (Signed)
Judge.

December 1, 1933.

85 And on, to wit, the 8th day of January, 1934 came the Parties by their attorneys and filed in the Clerk's office of said Court a certain Amendment to Stipulation of Facts in words and figures following, to wit:

86 * * (Caption) * *

AMENDMENT TO STIPULATION OF FACTS IN CONNECTION WITH THE INTERVENING PETITION HERETOFORE FILED BY MANUFACTURERS FINANCE COMPANY.

1. Paragraph 9 of the stipulation is entirely eliminated and in lieu thereof the following is substituted:

That the minimum rate of compensation or interest fixed by the contract, Exhibit "A" aggregates 20% per annum.

2. That part of paragraph 20 of the stipulation stating that compensation or interest at the contract rate from November 24, 1933 to December 29, 1933 amounts to $4,394.48, is hereby eliminated and there is substituted therefor the following:

(a) That all advances by the petitioner to the Grigsby-Grunow Company have been returned to petitioner, together with compensation or interest at the contract rate of 83½% of 1/30 of 1% of the net face amount of accounts, for each day from date of purchase by, until November 24, 1933, as provided in said contract.

(b) That no compensation or interest has been paid to petitioner since November 24, 1933 by the receivers.

(c) That compensation or interest from November 24, 1933 to December 29, 1933, if computed under paragraph 4 of the contract, would be $4,394.48.

(d) That paragraph 4 of the contract provides that
87 compensation or interest shall be 83½% of 1/30 of 1% of the net face amount of accounts for each day from date of purchase by, until paid to second party; that this amounts to a rate of 10% per annum upon the net face amount of accounts, as distinguished from cash invested for each day until the advances are realized.

(e) That prior to November 24, 1933 the practice in effect between the petitioner and the Grigsby-Grunow Company as recited in paragraph 10 of the stipulation, was for the petitioner to return to Grigsby-Grunow Company approximately one-half of the amount received upon assigned ac-

counts and endeavor to maintain the assigned accounts at approximately twice the net remaining balance of cash advances, as is provided by paragraph first of the contract. The same relative proportion between the net balance of advances and the remaining accounts assigned, was therefore, until the appointment of the receivers herein, at all times retained; the amount of assigned accounts having been double the amount of advances, and that relative ratio having been thereby maintained, compensation or interest under paragraph 4 was therefore at the rate of 20% per annum.

(f) That on November 25, 1933 the receivers herein presented a petition to the Court wherein it was recited the transactions had between the Grigsby-Grunow Company and the petitioner, and prayed for an order in conformity with said petition. That said order is in part as follows:

"It Is Therefore Ordered, Adjudged and Decreed that the receivers herein be and they are hereby authorized and directed to turn over and deliver on the same basis as prior to the filing of the bill of complaint herein, to Manufacturers Finance Company and/or Manufacturers and Dealers Finance Corporation, such funds as may come into the possession of the receivers herein from accounts receivable owing to the defendant corporation which have, prior to the filing of
88 the bill of complaint herein, been assigned to either said Manufacturers Finance Company and/or Manufacturers and Dealers Finance Corporation."

That immediately upon said order coming to the attention of the petitioner through its representatives and counsel, it objected to that portion of the order which reads:

"On the same basis as prior to the filing of the bill of complaint herein"

contending that it would be most hazardous from petitioner's viewpoint to turn back any portion of the collections until petitioner was reasonably assured that out of the accounts it then held, the balance due to it under the terms of the contract would be paid; at the conferences had between one of the receivers, Thomas L. Marshall, and representatives of the petitioner, the receivers suggested that the petitioner pay over to the receivers one-half of assigned accounts collected by the receiver, or permit the receiver to retain one-half thereof, which was not agreeable to the petitioner for the reasons then stated, that under the terms of the contract Exhibit "A", the finance company was not required to return any part of the remainder so long as any account or accounts

purchased by the petitioner shall be in any manner affected by any breach or violation of any warranty by the Grigsby-Grunow Company; that under the terms of the agreement (paragraph fifth) the Grigsby-Grunow Company warranted that: "There will be no suspension of business, request for general extension, bankruptcy petition, appointment of receiver, assignment for the benefit of creditors, or any other act amounting to a business failure by or against first party (Grigsby-Grunow Company) or any debtor"; and "That every account purchased hereunder (said contract, Exhibit "A"), and every settlement received thereon will be paid in full at maturity"; that a bankruptcy petition was filed on the 1st day of December, A. D. 1933 against the said Grigsby-Grunow Company; that an equity proceeding was filed and receivers were appointed by consent of the Grigsby-Grunow Company; that on November 24, 1933 there were many accounts which were not paid at maturity; that if petitioner returned one-half of the collections on such assigned accounts, it might ultimately suffer a substantial loss, in the event
89 that the accounts would not pay in full; that the receivers thereupon offered to recognize a claim by the petitioner for the amount of such loss, which claim would have been in the same class as that of other unsecured creditors; and for said reasons the said petitioner refused to turn back to the receiver approximately one-half of the accounts collected. That the receivers at or about the time these conversations were taking place, had approximately $50,000.00 in cash, received on account of accounts that were theretofore assigned to the petitioner, and a representative of the receivers was on the very day of such conference in the City of Detroit, Michigan, endeavoring to collect an account of $100,000.00 due from the Ford Motor Company to the Grigsby-Grunow Company, which was assigned prior to said date to the petitioner. That the petitioner's counsel did say that he would recommend to his client that if the receiver paid over the $50,000.00 on hand and the $100,000.00 to be collected immediately from said Ford Motor Company, that he would recommend that such payment be accepted and short-term receiver's certificates be accepted for one-half the balance due the intervening petitioner, which proposition the receivers refused to accept. That thereafter the intervening petition was filed herein, to which intervening petition the receivers filed an answer; in their answer the receivers do not request or demand that any accounts be re-assigned to the receivers. That thereafter, on

December 14, 1933, pursuant to an order of court, the receivers were directed to pay the petitioner $140,000.00 on account, over the objections of attorneys for the petitioner, who requested that the order at that time be for $223,973.55, which the receivers then had in their special account at the Continental Illinois National Bank, and represented moneys collected from accounts theretofore assigned to the petitioner; and likewise, on December 22, 1933 an order was entered directing the receivers to pay the petitioner $36,159.30 out of such special account, over the objection of the attorneys for the petitioner who asked that an order be entered directing the receivers to pay $56,732.16, which was then in said special account and was moneys collected on accounts theretofore assigned to the petitioner; that neither at the time of the payment of the $140,000.00, or at the time of the payment of the $36,159.30, did the receivers request the return of any portion of the assigned accounts receivable.

(g) The compensation or interest of $4,394.48 claimed from November 24, 1933 to December 29, 1933 constitutes an average claim of 28.3% interest upon average net balances outstanding.

(h) The rate of return to the petitioner is variable under the terms of the contract for the reason that the compensation is calculated on the net face amount of accounts rather than on cash money advanced.

(i) Computation of interest or compensation at 20% from November 24, 1933 to December 29, 1933 upon outstanding balances of advances would be $3,096.22, or $1,296.26 less than the petitioner is claiming in this proceeding.

(j) That interest at the rate of 7% per annum for said period amounts to $1,087.93.

3. That the Grigsby-Grunow Company is a large corporation showing on its balance sheet on September 9, 1933 approximately $21,415,467.00 upon the asset side of such balance sheets with an authorized capital stock of 3,000,000 shares of no par value of which 2,724,000 shares were issued and outstanding on said date, and has a Board of six Directors; that the making, execution and delivery of the contract Exhibit "A" was approved by the Board of Directors of said Grigsby-Grunow Company and the resolution adopted by said Board of Directors is hereto attached as Exhibit "C".

4. That in all other respects, excepting as herein changed,

the stipulation filed on December 29, 1933 and as modified, if at all, by the testimony of the witnesses, is hereby affirmed.

THOMAS L. MARSHALL
LEROI J. WILLIAMS
T. L. M.
Receivers.

EDWARD ROTHBART
Attorney for Intervening Petitioner.

91 EXHIBIT "C".

Please date and refer to place of execution.

Chicago, Illinois
October 5, 1933

Manufacturers' Finance Co.,
111 West Monroe Street,
Chicago, Illinois.

Gentlemen:

As per your request the following resolution has been presented to our Board of Directors at meeting held on the 5th day of Oct. 1933:

"Whereas this Company has entered into a contract with the Manufacturers' Finance Company, Chicago, Illinois, for the sale of certain accounts owing to this corporation, and whereas this Company has already executed a contract between it and the said Manufacturers' Finance Company, and whereas said contract was executed without formal authority from the Board of Directors.

Now Therefore Be It Resolved that the said contract be approved and the action of the officer of this Company in making said contract on behalf of this Company be ratified and confirmed.

And Be It Further Resolved that any officer of this Company is hereby authorized to sign on behalf of this Company "certificates of indebtedness" transferring all right, title and interest of this Company in and to all "accounts" listed thereon and sold or to be sold to Manufacturers' Finance Company, under the aforementioned contract.

And Be It Also Further Resolved that any officer of this Company is hereby authorized to make any future contracts with the said Manufacturers' Finance Company until the

authority hereby conferred has been rescinded and the Manufacturers' Finance Company notified thereof."

Yours very truly,

GRIGSBY-GRUNOW COMPANY

By LE ROI J. WILLIAMS

Vice President

Attest:

(Seal) M. D. HARRISON

Secretary.

92 And afterwards, to wit, on the 13th day of December, 1933, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge appears the following entry, to wit:

93 • • (Caption) • •

ORDER.

This cause coming on to be heard upon the intervening petition of Manufacturers Finance Company and the answer of the receivers thereto, and the receivers having moved in open court for authority to pay the finance company $140,000.00 toward the principal of its advances from the special account containing collections since the receivership upon such pledged accounts, and the intervening petitioner consenting thereto,

It Is Hereby Ordered, Adjudged and Decreed that the receivers pay $140,000.00 from their special account containing receipts since the date of the receivership upon pledged accounts, upon the basis of which advances were made by the intervening petitioner to Grigsby-Grunow Company, such payment to be covered in amount of the sums so turned over to the finance company, the accounts assigned to said company and first collected after the date of the receivership, such payment to be without prejudice to either intervening petitioner or the receivers as to any point or issue in the intervening petition or the answer thereto, or any point which may be added by amendment by either party. By leave of court the cause being continued to December 22, 1933 at 2:00 P. M.

Enter: BARNES

Judge

December 13, 1933

94 And afterwards, to wit, on the 20th day of December, 1933, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge appears the following entry, to wit:

95 * * (Caption) * *

ORDER.

This cause coming on to be heard upon the verified petition of Thomas L. Marshall and LeRoi J. Williams, receivers herein, after notice to all parties and no objection appearing thereto, and the court having examined said verified petition and being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed that the receivers herein are hereby authorized and directed:

(1) To pay to the Manufacturers Finance Company from the special account collections of pledged accounts receivable, a sum sufficient to pay the balance due and owing the said Manufacturers Finance Company at the date of the appointment of the receivers, together with interest to said date computed in accordance with the terms of the contract between said finance company and Grigsby-Grunow Company, after deduction of the amounts receivable paid said finance company on the trade acceptances held by them, the determination of any further amount to be paid the said finance company to await the hearing upon the intervening petition.

(2) After the payment to be made in paragraph 1 of this order to close the special account and to transfer any balance to the general account of the receivers, without prejudice to the said finance company or to Manufacturers and Dealers Finance Corporation, for any claim they or either of them shall make.

(3) To execute as receivers to February 28, 1934 lease for the first floor store and display room and office in the Pure Oil Building at a monthly rental of $300.00 per month, such lease to terminate prior to said February 28, 1934 upon discharge of the receivers prior to that time.

(4) Discount in ordinary banking transactions of notes received by the receivers with their endorsement as receivers.

(5) To take all steps necessary to carry through the sale by the Columbua Phonograph Company or its subsidiary the

Brazil properties for $24,000 cash and the additional cash sum of $16,000, the exact amount of the latter figure depending upon check of inventory and the sale by the Columbia Phonograph Company of real estate and building as described in the petition by it, located in Hollywood, California, for the sum of $16,000.

(6) To pay the amount of $1718.60 accrued payroll checks of factory and office, which checks are dated between April 1, 1933 and November 13, 1933, inclusive. This payment, together with the payment of payroll checks of factory and office employees dated between November 13, 1933 and November 24, 1933 inclusive, constituting payment of all such payroll checks of factory and office employees, such payment being necessary to preserve the business as a going business.

(7) To continue the group insurance policies and to pay therefor the sums which were paid by Grigsby-Grunow prior to the receivership.

Enter: BARNES
Judge

December 20, 1933.

96 And afterwards, to wit, on the 21st day of December, 1933, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge appears the following entry, to wit:

97 * * (Caption) * *

ORDER.

This cause coming on to be heard upon the motion of Thomas L. Marshall and LeRoi J. Williams receivers herein and with the consent of Manufacturers Finance Company,

It Is Hereby Ordered that in the order entered herein on December 20, 1933, paragraphs 1 and 2 of said order be amended to authorize the receivers to take up trade acceptances in the hands of the finance company due January and February, 1934, in the aggregate amount of $8,058.92 and to maintain in the special account hereinbefore provided in orders of this court the sum of $35,000 until further order of court or until the sums due the finance companies at the date of appointment of receivers has been paid to them as con-

templated in the order dated December 20, 1933, all without prejudice to any rights of the Finance Company to recover all moneys claimed by it under its contract.

Enter: BARNES
Judge

December 21, 1933.

98 And afterwards, to wit, on the 15th day of January, 1934, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge appears the following entry, to wit:

99 * * (Caption) * *

MEMORANDUM.

This cause is pending in this court on a bill whereby the court was asked to appoint a receiver to preserve the assets of the defendant. The court did appoint receivers, and they took charge of the business and property of the defendant.

The defendant had, prior to the institution of this suit, borrowed money from the intervening petitioner in a considerable amount, and agreed to pay therefor interest at the rate of approximately twenty-eight per cent. per annum. The method of borrowing was by means of the familiar "purchase of accounts" method. The principal and interest at the contract rate to the date of the appointment of the receivers has been paid to the intervening petitioner, and interest at the rate of seven per cent. since the appointment of the receivers has been offered to the petitioner. There has never been any doubt at any time but that such principal and interest would be paid provided the moneys to pay the same should come into the hands of the receivers from the pledged accounts. The intervening petitioner makes claim for interest at the rate of twenty-eight per cent. and for a large sum of money, something in excess of $7000, for attorney's fees in and about enforcing its claim.

The intervening petitioner makes the following points: that Illinois corporations cannot defend on the ground of usury,
and that they are permitted to pay any rate of interest
100 without regard to or restriction under any usury statute;
that the intervenor is entitled to recover its attorney's

fees and compensation from the receiver; that courts of equity follow the law; that a receiver cannot interpose a defense of usury when the laws of the state prohibit a corporation from interposing that defense; and that a receiver cannot recover back usurious interest.

It may be conceded that the foregoing propositions are correct statements of rules of law applicable in proper cases. In the court's opinion, they are not applicable here. The intervening petitioner has lost sight of one of the fundamental maxims of equity, namely, He who comes into equity must come with clean hands, or, expressed in another form, He that hath committed iniquity shall not have equity. In this case, and so far as the opportunities of this court for observation has extended in other cases, loan companies which make their loans by means of the method of purchasing accounts, uniformly refrain from giving notice, prior to receivership or bankruptcy, to the debtors of the assignment. It is said that they so refrain because if they did not so refrain they would alienate all of their customers; and, so far as the court's observation has extended, they refrain from giving notice to debtors of the assignment after receivership or after bankruptcy for the reason, as has been said, that the debtors are more likely to pay if they remain in ignorance of the assignment. As has been indicated in the case at bar, as regards the large majority of the assigned accounts, the intervening petitioner did not give notice to the debtors either before or after the appointment of receivers. The receivers have in this case gone to extraordinary efforts to maintain the integrity of the business of the defendant and to preserve the accounts receivable, including the pledged accounts, as live assets. Among other things, the receivers have ex-
101 pended the sum of approximately $35,000 in an advertising campaign, one of the principal purposes of which was to maintain the good will of the defendant and to preserve the receivables of the defendant as live and valuable assets. The intervening petitioner has had the benefit of the services of this court of equity. It is said that the court restrained the intervening petitioner from giving notice of the assignment of the accounts. The court observes that no motion has at any time been made to vacate that restraining order. The fact is that the intervening petitioner, because it refrained from giving notice of the assignment of the pledged accounts, was compelled to and did seek and accept the good offices of this court of equity in and about the collection of the pledged accounts.

In Vol. 1 Pomeroy's Equity Jurisprudence, Sec. 397, concerning the maxim He who comes into equity must come with clean hands, it is said:

"It assumes that the suitor asking the aid of a court of equity has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and and therefore refuses him all recognition and relief with reference to the subject-matter or transaction in question. It says that whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy."

It is inconceivable that a court of conscience should be compelled to do the unconscionable thing of paying twenty-eight per cent. interest per annum. The views hereinabove expressed are apparently in line with the views of the Circuit Court of Appeals of this Circuit and other District Courts in this Circuit. See: *In re Chicago Reed & Furniture Co.*, 7 Fed. (2d) 885; *In re Bowman Hardware & Electric Co.*, 3 Fed. Supp. 82. It is said that the rule in other circuits is different from that which is followed in this circuit, but the court is of the opinion that the rule which has been announced by the Circuit Court of Appeals of this circuit has the
102 greater support in reason and authority. Perhaps the court should say further, concerning the claim for attorney's fees, that the court cannot see any reason for the intervening petitioner having obligated itself for attorney's fees in any considerable amount. There has never been any doubt at any time but that, to the extent that the proceeds of the pledged accounts would become available, the principal of intervening petitioner's debt and contract interest thereon to the date of the appointment of the receivers, and legal interest thereon thereafter, would be paid.

The court thinks that the demand for contract interest and for attorney's fees is inequitable, and, accordingly, the prayer of the intervening petition will be denied, and the intervening petition will be dismissed at petitioner's costs.

Orders may be presented at the opening of court on Thursday, January 18, 1934.

BARNES
Judge

103 And afterwards, to wit, on the 31st day of January, 1934, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge appears the following entry, to wit:

Findings of Fact and Conclusions of Law.

104 * * (Caption) * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

1. Findings of Fact.

1. By written contract, on or about October 5, 1933, the Grigsby-Grunow Company agreed to pay to intervening petitioner for cash advances to it, interest at the rate of 10% per annum, not upon the balance of cash advance remaining from time to time, but upon the aggregate amount of accounts receivable and trade acceptances assigned by the Grigsby-Grunow Company to the intervening petitioner as security for said advances. Prior to November 24, 1933, the date of the receivership, it was the practice of the Grigsby-Grunow Company and of the intervening petitioner to make adjustments from time to time so that the outstanding balances of cash advances at all times amounted to approximately one-half of the aggregate amount of accounts receivable and trade acceptances remaining assigned as security for said advances. The interest rate, therefore, prior to November 24, 1933 amounted to approximately 20% per annum upon the outstanding balance of cash advances. Beginning November 24, 1933 the intervening petitioner no longer made such adjustments so as to maintain the outstanding balances of cash advances at one-half of the aggregate amount of accounts receivable and trade acceptances assigned, and applied literally the provisions of the contract which permitted the charging of interest at the rate of 10% per annum upon the aggregate amount of accounts receivable and trade acceptances remaining assigned, notwithstanding the reduction from time to time in the outstanding balances of cash advances. As
105 a result thereof, as payments were made after the receivership, the interest rate of 20%, which was the effect of the provision of the contract, rose sharply so that the average interest rate, so provided, after November 24, 1933

amounted to approximately 28-3/10% per annum, the interest rate for the last few days, before final payment of the principals of advances, amounting to in excess of 250% per annum.

2. No notices to the debtors of the assigned accounts or trade acceptances were given by the intervening petitioner prior to the date of the receivership and no such notices were given subsequent to the date of the receivership, except as to a small portion of such amounts constituting part of the trade acceptances, and no application was made by intervening petitioner to give such notices, except as to such part.

3. There has been no controversy at any time between the receivers and the intervening petitioner as to repayment of the entire principal amount of cash advances, with interest as provided under the contract dated November 24, 1933, and with interest at the rate of 7% per annum upon current balances of advances since November 24, 1933. A special bank account was established by the receivers at the inception of the receivership to include all sums received upon assigned accounts and assigned trade acceptances and all sums so received were placed in a special account. The advances of the intervening petitioner were all prior to November 24, 1933.

4. The receivership which commenced November 24, 1933 resulted in a freezing of the accounts receivable, including a substantial portion of the accounts assigned to the intervening petitioner. A substantial portion of said accounts receivable and trade acceptances were owed by distributors of Grigsby-Grunow Company, a majority of whom had claims for offsets in varying amounts against Grigsby-Grunow Company, and the accounts were in considerable jeopardy, not only by reason thereof, but also by reason of uncertainty in the minds of the distributors as to whether the business
106 would be continued. In order to facilitate the collection of accounts receivable and trade acceptances, of which approximately one-half were assigned to the intervening petitioner, as well as to attempt to preserve the goodwill of the going business, the receivers were authorized by order of court, to expend as a special appropriation for the month of December, 1933, the sum of $35,000. in advertising, and substantially that entire sum was so expended, and the receivers, in addition, held distributors' meetings and expended considerable sums in traveling expenses and otherwise, with the result that the accounts receivable were rendered more liquid, and in fact, within several weeks after November 24, 1933 the special bank account covering assigned accounts receivable and assigned trade acceptances, contained funds to pay off

the entire principals of cash advances by the intervening petitioner. The intervening petitioner incurred no part of this expense.

5. No evidence was introduced as to the amount of reasonable attorney's fees, if any, for counsel for intervening petitioner, for services necessarily rendered herein.

2. Conclusions of Law.

1. Regardless of the statutory maximum of interest under the laws of the State of Illinois, Courts of equity will not lend their aid to enforce contracts which upon their face are so manifestly harsh and oppressive as to shock the conscience.

2. One cannot come into a court of equity with clean hands and ask for an allowance at the rate of 28-3/10% interest per annum, and an allowance in excess of $7,000. solicitor's fees in a matter in controversy involving less than $5,000., when also no offer is made or willingness shown to bear any part of the substantial costs of collection of the assigned accounts and trade acceptances involved. The intervening petitioner, Manufacturers Finance Company excepted to the findings of fact and conclusions of law and still excepts.

Enter: BARNES
Judge

January 31, 1934.

107 And afterwards, to wit, on the 31st day of January, 1934, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge appears the following entry, to wit:

108 * * (Caption) * *

DECREE UPON THE INTERVENING PETITION OF MANUFACTURERS FINANCE COMPANY.

This cause coming on to be heard at this term of the intervening petition of Manufacturers Finance Company and the answer of LeRoi J. Williams and Thomas L. Marshall as receivers appointed herein, and upon a stipulation of facts and an amended stipulation of facts, and upon evidence adduced in open court, and the Court having heard the arguments of

counsel and being fully advised in the premises thereupon, upon consideration thereof,

It Is Hereby Ordered, Adjudged and Decreed that the receivers forthwith pay to Manufacturers Finance Company from the assets in their possession $1,087.93 being 7% interest from November 24, 1933 upon outstanding balances of advances made prior to the said date by Manufacturers Finance Company and that the further relief prayed in said intervening petition is hereby denied, and the receivers are directed to close the special account heretofore maintained for sums received upon accounts and trade acceptances assigned to Manufacturers Finance Company, and to consolidate any amount therein remaining with the general receivership bank account, and the Court's finding of facts and conclusions of law with reference to the issues presented by the intervening petitioner are filed contemporaneously herewith and are made a part of the record in this cause together with the opinion of the Court rendered January 15, 1934.

To the entry of which decree and order the intervening petitioner Manufacturers Finance Company, excepted, and still excepts.

Enter: BARNES
Judge

January 31, 1934.

109 And on, to wit, the 31st day of January, 1934 came the Petitioner by its attorneys and filed in the Clerk's office of said Court a certain Petition for Appeal in words and figures following, to wit:

110 * * (Caption) * *

PETITION FOR APPEAL.

To the Honorable John P. Barnes, Judge of Said Court:

1. And now comes Manufacturers Finance Company, a corporation, Intervener, by Edward I. Rothbart, its attorney, and the intervener feeling itself aggrieved by the final decree of this Court made and entered on the 31st day of January, A. D. 1934, hereby prays that an appeal may be allowed to it from said decree to the United States Circuit Court of Appeals for the Seventh Circuit, and in connection with this petition, petitioner herewith presents its assignment of errors.

2. Petitioner therefore prays that its appeal be allowed and citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated may be sent to the United States Circuit Court of Appeals for the Seventh Circuit.

EDWARD ROTHBART
Attorney for Intervener

The foregoing appeal is hereby allowed

BARNES
United States District Judge

111 And on, to wit, the 9th day of February, 1934 came the Intervenor by its attorneys and filed in the Clerk's office of said Court a certain Assignment of Errors in words and figures following, to wit:

112 * * (Caption) * *

ASSIGNMENT OF ERRORS.

Now comes the intervenor in the above entitled cause, Manufacturers Finance Company, a corporation, and says that the decree entered therein on the 31st day of January, 1934 is erroneous in this, to-wit:

1. The Court erred in denying the motion of intervening petitioner to striks out the answer and the amendment to the answer filed by the receivers.

2. The Court erred in refusing to allow the compensation, attorney's fees and costs accrued under the contract sued on.

3. The Court erred in refusing to find that the intervener had the right of the possession and collection of the accounts receivable that had been assigned to intervener, until reimbursed as to moneys advanced, compensation, attorney's fees, costs and expenses.

4. The Court erred in refusing to order the receivers to turn over to the intervener all moneys and evidence of indebtedness arising out of the collection of the accounts assigned, as prayed in the intervening petition.

5. The Court erred in not holding that the validity of the contract should be determined by the law of Illinois.

6. The Court erred in not holding that the contract was valid, legal and enforcible under the law of Illinois.

113 7. The Court erred in not allowing compensation at the rate provided for in the contract, subsequent to No-

vember 24, 1933 and until intervener had been paid in full its advances.

8. The Court erred in holding that the rate of interest up to November 24, 1933 was 28% per annum.

9. The Court erred in not allowing intervener a reasonable amount for attorney's fees incurred by it in the prosecution of its intervening petition, as prayed for in said intervening petition.

10. The Court erred in not holding that neither Illinois corporations nor receivers for them, can defend this action on the ground of usury.

11. The Court erred in not holding that corporations created under the Illinois law are permitted to borrow money at such rates of interest as the corporation may determine without regard to or restrictions under any usury law of the State of Illinois.

12. The Court erred in not holding that under the Illinois law, with respect to money loaned to or in any manner due and owing from a corporation, the parties may stipulate or agree upon any rate of interest whatsoever and take and pay the same.

13. The Court erred in dismissing the intervening petition at petitioner's costs.

14. The Court erred in admitting evidence relative to the expenditure of $35,000.00 for advertising.

Wherefore the intervener prays that said decree may be reversed.

EDWARD ROTHBART,
Attorney for Intervener, Manufacturers Finance Company.

114 And afterwards, to wit, on the 31st day of January, 1934, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge appears the following entry, to wit:

115 * * (Caption) * *

ORDER ALLOWING APPEAL.

The petition of Manufacturers Finance Company, a corporation, intervener, for appeal filed the 31st day of January, A. D. 1934, is hereby granted and said appeal is hereby al-

lowed, this order to be effective upon the said intervener giving bond conditioned as required by law and acceptable to this Court, in the sum of $250.00 to secure the receivers in respect to costs.

Chicago, Illinois, January 31, 1934.

BARNES,
Judge of the United States District Court.

116 And on, to wit, the 31st day of January, 1934 come Manufacturers Finance Company, a corporation, as principal and Grigsby-Grunow Company, a corporation, as surety, and filed in the Clerk's office of said Court, in said entitled cause, a certain Bond on Appeal in words and figures following, to wit:

117 APPEAL BOND.

Know All Men By These Presents that the Manufacturers Finance Company, a corporation, as Principal, and United States Fidelity & Guaranty Company, a corporation organized under the laws of Maryland, as Surety, are held and firmly bound unto LeRoi J. Williams and Thomas L. Marshall, Receivers for the defendant Grigsby-Grunow Company, a corporation, in the full and just sum of Two Hunudred and Fifty ($250.00) Dollars, to be paid to DeRoi J. Williams and Thomas L. Marshall, receivers as aforesaid, their successors and assigns, to which payment well and truly to be made we bind ourselves jointly and separately by these presents.

Sealed with our seals and dated this 31st day of January, A. D. 1934.

The Condition of this obligation is that Whereas the District Court of the United States for the Northern District of Illinois, Eastern Division, did on the 31st day of January, 1934 in the matter of the intervening petition of the Manufacturers Finance Company filed in the said action of P. R. Mallory and Co. Inc. a corporation versus Grigsby-Grunow Company, a corporation, sign a decree disallowing the lien claimed by said intervener in its intervening petition, which decree was entered of record in said court on the 31st day of January, 1934, and said Manufacturers Finance Company has obtained an order of the said court allowing its appeal from said decree in the aforesaid suit, and a citation directed to LeRoi J. Williams and Thomas L. Marshall, receivers as

aforesaid, citing and admonishing them to be and appear at the United States Circuit Court of Appeals of the Seventh Circuit in the City of Chicago, Illinois, thirty (30) days from and after the date of said decree:

Now, the condition of the above obligation is such that if the said Manufacturers Finance Company shall prose-
118 cute said appeal with effect and pay all costs which may be awarded the said LeRoi J. Williams and Thomas L. Marshall, receivers, on the final termination of this action if said intervener fails to make good its plea, then the above obligation to be void; otherwise to remain in full force and effect.

MANUFACTURERS FINANCE COMPANY, (Seal)
By: R. T. HAMILTON,
Asst. Treas.
UNITED STATES FIDELTY & GUARANTY CO.
By EDMOND J. MORONEY (Seal)
Attorney-in Fact.

Approved this 31st day of January, A. D. 1934.
BARNES,
Judge United States District Court.

119 And on, to wit, the 9th day of February, 1934 came the parties by their attorneys and filed in the Clerk's office of said Court a certain Stipulation in words and figures following, to wit:

120 * * (Caption) * *

STIPULATION.

It is hereby stipulated and agreed by and between Edward Rothbart, attorney for Manufacturers Finance Company, intervening petitioner-appellant, and LeRoi J. Williams and Thomas L. Marshall, receivers herein, as follows:

1. The receivers herein hereby expressly waive service of a copy of the praecipe for record and waive all the time allowed by law for the filing of objections thereto, and waive the right to file their praecipe of any additional portions of the record to be incorporated into the transcript, and consent that the Clerk prepare a certified transcript of record in accordance with said praecipe.

2. Said receivers waive the issuance of a citation directed to them and waive proof of service of such citation on them.

3. The receivers waive notice of the lodgment of the transcript of testimony—in narrative form, and waive proof of service of notice of the lodgment of said transcript of testimony in narrative form, and waive all objections or amendments thereto, and consent that the same be approved by the Court.

4. Said receivers hereby expressly waive any and all other notice or notices to which they might otherwise be entitled in order to perfect said appeal.

EDWARD ROTHBART,
Attorney for Manufacturers Finance Company, Intervening Petitioner-Appellant.

THOMAS L. MARSHALL,
LEROI J. WILLIAMS,
Receivers-Appellees.

121 • • (Caption) • •

PRAECIPE FOR RECORD.

The Clerk of this Court is hereby directed to prepare a certified transcript of record of the above entitled cause for use by the United States Circuit Court of Appeals, by including therein the following:

1. Bill of Complaint.
2. Answer of defendant to bill of complaint, dated November 24, 1933.
3. Order of appointment of temporary receivers dated November 24, 1933.
4. Order approving bonds of receivers.
5. Consent to appointment of receivers dated November 25, 1933.
6. Petition of temporary receivers for leave to turn over funds belonging to Manufacturers Finance Company and Manufacturers & Dealers Finance Corporation, dated November 25, 1933.
7. Order entered November 25, 1933 in connection with last mentioned petition.
8. Intervening petition of Manufacturers Finance Company.
9. Order granting leave to Manufacturers Finance Company to intervene, dated November 29, 1933.
10. Answer of receivers to said intervening petition, dated December 6, 1933.

11. Order of appointment of permanent receivers.
12. Amendment to answer of receivers to intervening petition.
122 13. Motion of intervening petitioner to strike out amendment to answer and original answer of receivers to intervening petition.
14. Order denying motion to strike out answer and amendment to answer.
15. Transcript of testimony—narrative form.
16. Stipulation of facts, including Exhibits "A", "B" and "C" and "D".
17. Amendment to sipulation of facts, including Exhibit "C".
18. Order of December 13, 1933 that receivers pay $140,000 from the special account, to the Manufacturers Finance Company toward the principal of its advances, without prejudice.
19. Order of December 20, 1933 authorizing receivers to pay Manufacturers Finance Company the balance due and owing at the date of the appointment of the receivers, together with interest to said date.
20. Order of December 21, 1933 authorizing receivers to take up trade acceptances.
21. Opinion of Judge John P. Barnes dated January 15, 1934.
22. Findings of fact and conclusions of law entered January 31, 1934.
23. Decree entered January 31, 1934.
24. Assignment of errors.
25. Petition for appeal.
26. Order allowing appeal.
27. Appeal bond and approval thereof.
28. Approval by the Court of transcript of testimony in narrative form. (See Item 15)
29. Praecipe for Record.
30. Stipulation waiving issuance of citation and proof of service/ waiving service of praecipe for record; waiving notice of lodgment of transcript of testimony in narrative form.

EDWARD ROTHBART,
Attorney for Manufacturers Finance Company, Intervening Petitioner-Appellant.

Endorsed: Filed February 9, 1934 Charles M. Bates, Clerk.

123 Northern District of Illinois } ss.
Eastern Division }

I, Charles M. Bates, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled P. R. Mallory & Co. Inc., a corporation vs. Grigsby-Grunow Company, a corporation, No. 13581, as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 15th day of February, A. D. 1934.

CHARLES M. BATES,

(Seal) *Clerk.*

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 83, inclusive, contain a true copy of the printed record, printed under my supervision and filed on February 21, 1934, on which the following entitled cause was heard and determined,

Manufacturers Finance Company,

Appellant,

vs.

Frank M. McKey, as Trustee in Bankruptcy for the Estate of Grigsby-Grunow Company, a Corporation,

Appellees,

No. 5170, October Term, 1933, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 19th day of October, A. D. 1934.

(Seal)

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room, in the City of Chicago, in said Seventh Circuit on the third day of October, 1933, of the October Term in the year of our Lord One Thousand Nine Hundred and Thirty-Three and of our Independence the One Hundred and Fifty-Eighth.

5170 Manufacturers Finance Company, *vs.* Le Roi J. Williams and Thomas L. Marshall, Receivers for Grigsby-Grunow Company, a Corporation. } Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

And on, to-wit: On the sixteenth day of February, 1934, there was filed in the office of the Clerk of this court an appearance of counsel for the appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5170. October Term, 1933.

P. R. Mallory and Co. Inc., a corporation,

vs.

Grigsby Grunow Company, a corporation.

Manufacturers Finance Company, a corporation,

vs.

Le Roi J. Williams and Thomas L. Marshall, Receivers.

The Clerk will enter our appearance as counsel for the Manufacturers Finance Company, a corporation, Appellant.

EDWARD I. ROTHBART,
NORMAN M. PETERSON,
1 North La Salle St.

Endorsed: Filed February 16, 1934, Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twentieth day of March, 1934, there was filed in the office of the Clerk of this court an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5170. October Term, 1933.

P. R. Mallory & Co., Inc.,

vs.

Grigsby Grunow Company.

Manufacturers Finance Company,

vs.

Leroy J. Williams and Thomas L. Marshall, Receivers.

The Clerk will enter our appearance as counsel pro se.

THOMAS L. MARSHALL,
LE ROI J. WILLIAMS,
134 S. La Salle St.

Endorsed: Filed March 20, 1934, Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the tenth day of April, 1934, the following further proceedings were had and entered of record, to-wit:

Tuesday, April 10, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

Manufacturers Finance Company,
5170 *vs.*
Le Roi J. Williams and Thomas L. Marshall, etc.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on April 27, 1934.

And afterwards, to-wit: On the twenty-seventh day of April, 1934, there was filed in the office of the Clerk of this court a motion for substitution of Trustee, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5170.

P. R. Mallory & Co., Inc., a corporation,
Plaintiff,

vs.

Grigsby-Grunow Company, a corporation,
Defendant.

Manufacturers Finance Company,
Appellant,

vs.

Le Roi J. Williams and Thomas L. Marshall, Receivers for Grigsby-Grunow Company, a corporation,
Appellees.

MOTION.

Now come Le Roi J. Williams and Thomas L. Marshall, Receivers for Grigsby-Grunow Company, a corporation, appellees, and move the court, pursuant to a stipulation of the parties filed herewith, to allow a substitution of Frank M. McKey, as Trustee in Bankruptcy of the Estate of Grigsby-Grunow Company, for Le Roi J. Williams and Thomas L. Marshall, as appellee.

THOMAS L. MARSHALL,
LE ROI J. WILLIAMS,
By THOMAS L. MARSHALL.

Endorsed: Filed Apr. 27, 1934, Frederick S. Campbell, Clerk.

And on the same day, to-wit: On the twenty-seventh day of April, 1934, there was filed in the office of the Clerk of this court a stipulation for substitution of Trustee, which said stipulation is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5170.

P. R. Mallory & Co., Inc., a corporation,
Plaintiff,

vs.

Grigsby-Grunow Company, a corporation,
Defendant.

Manufacturers Finance Company,
Appellant,

vs.

Le Roi J. Williams and Thomas L. Marshall, Receivers for Grigsby-Grunow Company, a corporation,
Appellees.

STIPULATION FOR THE SUBSTITUTION OF FRANK M. McKEY, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF GRIGSBY-GRUNOW COMPANY, A CORPORATION, FOR LE ROI J. WILLIAMS AND THOMAS L. MARSHALL, RECEIVERS IN EQUITY, APPELLEES.

It is hereby stipulated and agreed by and between Manufacturers Finance Company, appellant, Le Roi J. Williams and Thomas L. Marshall, Receivers for Grigsby-Grunow Company, a corporation, appellees, and Frank M. McKey, as Trustee in Bankruptcy of the Estate of Grigsby-Grunow Company, bankrupt, as follows:

1. That on the 18th day of February, 1934, and after the petition for appeal in this cause had been granted, a petition in bankruptcy was filed in the United States District Court for the Northern District of Illinois, Eastern Division, in a cause entitled "In the Matter of the Grigsby-Grunow

Company, Alleged Bankrupt, No. 55173"; that on the 20th day of February, 1934, the said District Court, sitting in bankruptcy, appointed Frank M. McKey receiver in bankruptcy of said Grigsby-Grunow Company and that immediately thereafter the said receivers in equity turned over the assets of the Grigsby-Grunow Company to the said receiver in bankruptcy; that on the 10th day of March, 1934, the said Grigsby-Grunow Company was adjudicated bankrupt by said District Court; and that on the 16th day of April, 1934, at a meeting of creditors of the said Grigsby-Grunow Company, Frank M. McKey was duly elected trustee of the Estate of said Grigsby-Grunow Company, bankrupt, that the said Frank M. McKey has qualified as such trustee and is now acting as such trustee;

2. That because the assets of the said Grigsby-Grunow Company are now in the custody and control of the United States District Court, sitting in Bankruptcy, and the said Trustee in Bankruptcy, all of the undersigned persons believe that it is proper that the said Frank M. McKey be substituted in this cause as appellee in place of LeRoi J. Williams and Thomas L. Marshall, Receivers in Equity, appellees, and hereby agree and consent to such substitution of parties.

MANUFACTURERS FINANCE COMPANY,
Appellant,
By EDWARD ROTHBART, and
NORMAN M. PETERSON,
Its Counsel.

THOMAS L. MARSHALL,
LE ROI J. WILLIAMS,
By THOMAS L. MARSHALL,
Receivers in Equity for Grigsby-Grunow Company, Appellees.

FRANK M. McKEY,
Trustee in Bankruptcy for Grigsby-Grunow Company.

Endorsed: Filed Apr. 27, 1934. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-seventh day of April, 1934, the following further proceedings were had and entered of record, to-wit:

Friday, April 27, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Louis FitzHenry, Circuit Judge.

Manufacturers Finance Company,
5170 *vs.*
Le Roi J. William, *et al.*, Receivers, etc.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On motion of counsel for appellees, Le Roi J. Williams and Mr. Thomas L. Marshall, Receivers for Grigsby-Grunow Company, and on stipulation of counsel, It is now here ordered that Frank M. McKey, as Trustee in Bankruptcy of the Estate of Grigsby-Grunow Company be substituted for and in the place of said Receivers as appellee in this cause.

And afterwards, to-wit: On the nineteenth day of June, 1934, there was filed in the office of the Clerk of this court the opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5170. October Term, 1933, April Session, 1934.

P. R. MALLORY & CO., INC., a Corporation,
Plaintiff,
vs.
GRIGSBY-GRUNOW COMPANY, a Corporation,
Defendant.

MANUFACTURERS FINANCE COMPANY,
Appellant,
vs.
FRANK M. McKEY, as Trustee in Bankruptcy for the Estate of GRIGSBY-GRUNOW COMPANY, a Corporation,
Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

June 19, 1934.

Before ALSCHULER, SPARKS, and FITZHENRY, *Circuit Judges.*

SPARKS, *Circuit Judge.* This appeal arises out of a controversy between the receivers of the Grigsby-Grunow Company, an Illinois corporation organized for the purpose of manufacturing certain merchandise, and appellant, a Finance Company incorporated in Delaware, as to the balance due from the receivers under a certain contract entered into between the two parties.

On October 5, 1933, the Grigsby-Grunow Company, hereafter referred to as the Company, entered into the contract in question, with appellant, according to the terms of which the latter agreed to purchase from the former such accounts receivable and trade acceptances as were acceptable to it. These "accounts" evidenced sales and deliveries of personal property usually dealt in by the Company. The rate of interest agreed upon was 10%, not upon the balance of cash advance remaining from time to time, but upon the aggregate amount of accounts assigned to appellant as security for the

advances. The contract also provided that the appellant should furnish certain so-called services to the Company, described by appellant as follows: "Upon request, to furnish by mail to the company its credit information in hand about the customers of the company; have its auditors give to the company the report of each examination provided for in the contract, with full information and advice as to the most desirable method of keeping the books, records and accounts of the company; pay for all accounting, postage and credit investigation of accounts purchased or offered for purchase under the contract and upon request give financial and business advice; obtain and have on hand at all times sufficient funds to make prompt remittance to the company for all acceptable accounts within the limits agreed upon in the contract; supply all forms needed for the assignment of accounts; place its credit department and collection department at the disposal of the company and permit the company to submit any of its sales contracts with its customers to the general counsel of appellant for advice and opinion as to the form and legality thereof."

It was stipulated by the parties that the rate of compensation or interest fixed by the contract aggregated a minimum of 20% per annum, and that prior to the appointment of the receivers it was the custom of the parties for the Company to assign and deliver to appellant the schedules of accounts whereupon appellant would check the credit risk and, if satisfied with the accounts, transmit its check for 50% of the face value of the accounts to the Company. Then as the latter received payment from its customers it transmitted each payment in its original form to appellant, who thereupon endorsed and deposited the remittances and sent the Company the balance of the face value of the accounts not already advanced, less any deductions.

Since the appointment of the receivers, November 24, 1933, no further accounts receivable have been assigned to appellant, nor has any of the money collected on the accounts previously assigned been paid over except under order of the court, in accordance with which the entire amount advanced by appellant to the Company together with interest at the minimum contract rate of 20% up to November 24, has been repaid by the receivers.

On November 29, 1933, appellant filed an intervening petition in the receivership proceedings asking that title to the accounts be declared in it, with the right to hold them until

the receivers paid the unpaid balance plus service charges, attorneys' fees, costs and expenses in accordance with the contract provisions. The compensation claimed was $4,394.48 from November 24 to December 29, which amount was $1,296.26 more than the 20% charged up to November 24. In addition, attorneys' fees of $7,800 were claimed, the amount being computed on the amount of accounts outstanding in the hands of appellant rather than on the amount due. The following testimony of a member of the Bar was introduced with reference to the reasonableness of the fee claimed: "From the facts given to me and basing it on the amount involved, being $261,000, I would say that 3% of that, $7800 would be reasonable attorneys' fees on a 15 day basis."

Appellant refused to follow its practice of returning to the Company whatever accounts it held over twice the amount due from the Company on the unpaid balances, and insisted upon following the strict letter of the contract which did in effect permit the retention of the entire amount of accounts receivable, and the collection of interest upon them at the contract rate of 10% until the entire loan was paid off. As to this point it was stipulated that the contract provided that compensation or interest should be 83⅓% of 1/30 of 1% of the net face amount of accounts for each day from date of purchase by appellant until paid to it, and that this amounted to a rate of 10% per annum upon the net face amount of accounts, as distinguished from cash invested for each day until the advances were realized. The effect of this would be to entitle appellant to interest at an average of over 28% from the date of receivership proceedings, and of 250% during the latter part of that period. It was shown that there was never any question but that appellant would receive back the balance on its loan, and that the receiver offered to pay interest at the rate of 7% on the unpaid balance. On the ground that its demand for the contract rate, and for $7800 attorneys' fees alleged to be incurred in the proceedings was contrary to the principles practiced in a court of equity, the District Court dismissed the intervening petition.

The first point urged by appellant is that the contract was one for service and not merely for the lending of money, and that the court therefore has no right to inquire into the reasonableness of the compensation provided for by the parties. We do not agree that these so-called services were sufficient to take the contract out of the category of a loan and classify

it as a contract for service. See *Home Bond Company* v. *McChesney*, 239 U. S. 568; *National Discount Company* v. *Evans*, 272 Fed. 570; *LeSueur* v. *Manufacturers Finance Company*, 285 Fed. 490; *In re Grand Union Company*, 210 Fed. 353; *Chase and Baker Company* v. *National Trust and Credit Company*, 215 Fed. 633; *In re Gotham Can Company*, 48 F. (2d) 540. Under the principles laid down in these cases, we think that the transaction in question is properly classified and treated as a loan.

Appellant contends, however, that even though the transaction may be considered in the nature of a loan, that fact does not do away with its right to collect interest at the rate reserved by the contract for the reason that under the Illinois statute on Interest, as amended in 1925, Illinois Revised Statutes 1933, ch. 74, sec. 4, not only is a corporation not allowed to interpose a defense of usury to an action on a contract, but it is specifically permitted to contract for interest at any rate it may determine, and to pay at that rate. In accordance with this, appellant argues that it is entitled not only to its interest at the contract rate, but also to its attorneys' fees rendered necessary in the collection of its interest. It finds substantial support for this argument in certain cases cited by it,[1] the strongest of which for its purposes is *In re International Raw Material Corporation*, 22 F. (2d) 920, decided by the Court of Appeals for the Second Circuit. In that case the Court of Appeals reversed the decision of the District Court disallowing the claim of a Finance Company based upon a contract providing for interest at the rate of 6% on the amount loaned, plus a commission of 1½% a month. In reversing the District Court which had based its decision on the authority of a decision of this court, *In re Chicago Reed and Furniture Company*, 7 F. (2d) 885, the court said, "There seems no justification in nullifying the agreement of the parties here, because the interest and commissions which they deliberately arranged were too large to satisfy the ideas of a court. Here, as in other similar cases, the competition of the market fixes rates. * * *" In allowing the disputed claims in that case the court also allowed attorney fees of $500 which it stated were "concededly reasonable." In the Chicago Reed Furniture case, this court refused to allow against a bankrupt estate a claim for a

[1] *Estes* v. *E. R. Estes & Sons*, 24 F. (2d) 756; *Lutz & Schramm, Inc.*, 38 A. B. R. 351; *In re International Raw Material Co.*, 22 F. (2d) 920; *In re Gotham Can Co.*, 48 F. (2d) 540; *Ramsey* v. *Marlin Firearms Co.*, 14 F. (2d) 314. See also *In re Bernard & Katz*, 38 F. (2d) 40, not cited by appellant.

$300 commission on a loan of $1700 on the ground that, regardless of the state usury statute and its inapplicability in the case of a corporation, a court of equity was not compelled to render its aid in the enforcement of a contract which provided for a rate of interest exceeding 40% per annum.

We concede that the International Raw Material Corporation case is quite similar in many respects to the case at bar. They do differ in the amount of attorneys' fees claimed, and in the fact that in the instant case, the Finance Company is attempting to charge the receivers a rate considerably higher than the rate in fact used between the contracting parties, which was the minimum rate reserved by the contract. It is of course idle to speculate as to the motives of the parties, and yet it seems possible that the Finance Company may have been influenced in charging the lowest rate rather than the higher one it could have charged against the Company from the inception of the contract because of the possibility of its cancellation under one of its provisions allowing such cancellation at any time as to future transactions upon written notice. The insistence of appellant upon its claim for the full rate of interest plus attorneys' fees at a preposterous rate, when it appeared that there was no more business to be done under the contract because of the receivership of the Company savors too much of the exaction of the pound of flesh from the creditors of the insolvent company to be enforcible in a court of equity. If this case arose in an action at law between the original parties it may well be that the court could not refuse to enforce the contract according to its strictest terms. But where the creditor goes beyond the practice of the parties under the original contract and tries to enforce rights never asserted against the other contracting party, and in addition tries to collect counsel fees exceeding 177% of the maximum amount claimed against the receiver who is attempting to salvage the assets for the benefit of the other creditors who have a substantial interest in the estate of the debtor, we can not feel that a court of equity is any place for him to press his demands. As stated in *National Fire Insurance Company* v. *Thompson*, 281 U. S. 331, "Courts of equity frequently decline to interfere on behalf of a complainant whose attitude is unconscientious in respect of the matter concerning which it seeks relief." We can see no reason under the circumstances of this case for overruling the principle laid down in the Chicago Reed Furniture case, *supra*, in favor of that enunciated in International Raw Material Corporation, *supra*.

Decree affirmed.

And on the same day, to-wit: On the nineteenth day of June, 1934, the following further proceedings were had and entered of record, to-wit:

Tuesday, June 19, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Louis FitzHenry, Circuit Judge.

Manufacturers Finance Company,
5170 *vs.*
Frank M. McKey, as Trustee in Bankruptcy of the Estate of Grigsby - Grunow Company, a Corporation.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof: It is now here ordered, adjudged and decreed by this Court that the order or decree of the said District Court in this cause appealed from be, and the same is hereby affirmed with costs.

And afterwards, to-wit: On the seventh day of July, 1934, there was filed in the office of the Clerk of this court a petition for rehearing, which said petition for rehearing is in the words and figures following, to-wit:

And on the same day, to-wit: On the second day of October, 1934, the following further proceedings were had and entered of record, to-wit:

Tuesday, October 2, 1934.

Court opened by proclamation.

Before:

Hon. William M. Sparks, Circuit Judge.

Manufacturers Finance Company,
5170 *vs.*
Frank M. McKey, as Trustee, etc.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On petition of counsel for appellant, it is ordered that the mandate in this cause be stayed until and including November 13, 1934, and if on or before that date there is filed in this court a certificate of the Clerk of the Supreme Court of the United States that a petition for a writ of certiorari has been filed therein, the stay shall continue in force until the final disposition of this cause by the Supreme Court of the United States.

And afterwards, to-wit: On the 15th day of October, 1934, there was filed in the office of the Clerk of this court a praecipe for Supreme Court record, which said praecipe is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

P. R. Mallory & Co., Inc., a corporation,
vs.
Grigsby-Grunow Company,
Defendant.

Manufacturers' Finance Company,
vs.
Frank McKey, as Trustee in Bankruptcy of the Estate of Grigsby-Grunow Company.

} Number 5170.

PRAECIPE.

To: Honorable Frederick G. Campbell, Clerk of said Court:

Please prepare and have printed the complete record in this proceeding as a transcript of the record for the purpose of enabling Manufacturers' Finance Company, Appellant, to file its petition for writ of certiorari in the United States Supreme Court, including in the said transcript of the record the petition for rehearing filed by said Appellant.

MANUFACTURERS' FINANCE COMPANY,
Appellant,
By: ROTHBART, PETERSON & ROSENFIELD,
Its Solicitors.

Endorsed: Filed Oct. 15, 1934. Frederick G. Campbell, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 87 to 120, inclusive, contain a true copy of the proceedings had and papers filed, made in accordance with the Praecipe for Supreme Court Record filed on October 15, 1934, in the case of

Manufacturers Finance Company,
Appellant,

vs.

Frank M. McKey, as Trustee in Bankruptcy for the Estate of Grigsby-Grunow Company, a Corporation,
Appellees,

No. 5170, October Term, 1933, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 19th day of October, A. D. 1934.

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

[fol. 122] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 3, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT

OCTOBER TERM, 1933, APRIL SESSION, 1934

No. 5170

P. R. MALLORY & CO., INC., a Corporation,
Plaintiff,

vs.

GRIGSBY-GRUNOW COMPANY,
a Corporation,
Defendant.

MANUFACTURERS FINANCE COMPANY,
Appellant,

vs.

FRANK M. McKEY, as Trustee in Bankruptcy for the Estate of Grigsby-Grunow Company, a Corporation,
Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable
John P. Barnes,
Judge Presiding.

APPELLANT'S PETITION FOR REHEARING

Counsel for Appellant:
MR. EDWARD ROTHBART,
MR. NORMAN M. PETERSON,
One N. La Salle Street,
Chicago, Illinois.

MR. THOMAS L. MARSHALL,
MR. LeROI J. WILLIAMS,
Receivers, Pro Se,
134 S. La Salle Street,
Chicago, Illinois.

State Law Printing Company, 173 W. Madison St., Chicago--FRAnklin 5501

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT

OCTOBER TERM, 1933, APRIL SESSION, 1934

No. 5170

P. R. MALLORY & CO., INC., a Corporation,
Plaintiff,

vs.

GRIGSBY-GRUNOW COMPANY, a Corporation,
Defendant.

MANUFACTURERS FINANCE COMPANY,
Appellant,

vs.

FRANK M. McKEY, as Trustee in Bankruptcy for the Estate of Grigsby-Grunow Company, a Corporation,
Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable **John P. Barnes,** Judge Presiding.

APPELLANT'S PETITION FOR REHEARING

Comes now the appellant and respectfully petitions the Court for a rehearing in this cause, and in support of said petition presents the following points and arguments.

In effect, the Court in its opinion says:

1. That because appellant **ATTEMPTED** to collect compensation or interest in accordance with the terms of its contract, it should be penalized and forfeit all interest, be it at 28.3 per cent, the amount chargeable

according to the strict interpretation of the contract, or 20 per cent, the amount which the parties had been paying during all of their transactions and up to the appointment of the receivers.

2. That because appellant **ATTEMPTED** to recover $7,800 (which we deny) for attorneys' fees, no attorneys' fees at all should be allowed.

It must be borne in mind that from the nature of the proceedings appellant was required to intervene in this suit. Appellant did not choose the forum. It came into this equity proceeding because the receivers collected and retained moneys belonging to it. This is not the situation of a direct proceeding instituted in equity, wherein appellant was seeking the aid of the Court. It was merely a request that the Chancellor instruct his receiver not to appropriate moneys collected on accounts theretofore sold or pledged by the company. In its intervening petition it set forth its contract and its rights thereunder. To this petition an answer was filed by the receivers, in effect denying that receivers can be required to pay more than 7 per cent interest. The receivers filed no plea of usury and in their answer did not question the attorneys' fees. A motion to strike out the answer as insufficient was denied and a hearing was had on the issues thus joined. The learned trial Court denied relief to the finance company on the ground that 28 per cent interest is unconscionable and that attorneys' fees "in any considerable amount" should not have been incurred, making no decision as to what amount of interest in excess of 7 per cent is conscionable and not fixing any attorneys' fees whatsoever.

In its opinion this Court says:

> "We concede that the International Raw Material Corporation case is quite similar in many

respects to the case at bar. They do differ in the amount of attorneys' fees claimed and in the fact that in the instant case the finance company is **ATTEMPTING** to charge the receivers a rate considerably higher than the rate in fact used between the contracting parties which was the minimum rate reserved by the contract. * * * The **INSISTENCE** of appellant upon its claim for the full rate of interest, plus attorneys' fees at a preposterous rate, when it appeared that there was no more business to be done under the contract because of the receivership of the company, savors too much of the exaction of the pound of flesh from the creditors of the **INSOLVENT** company, to be enforced in a court of equity. * * * But where the creditor goes beyond the practice of the parties under the original contract and **TRIES** to enforce rights never asserted against the other contracting party, and in addition, **TRIES** to collect counsel fees exceeding 177% of the maximum amount claimed against the receiver, who is attempting to salvage the assets for the benefit of the other creditors who have a substantial interest in the estate of the debtor, we cannot feel that a court of equity is any place for him to press his demands." (Caps ours.)

Certainly, there is nothing in the foregoing language of the opinion which finds that any wrong was committed by the finance company. The sin apparently lies in the alleged **ATTEMPT** by the appellant to do certain things, or **TRYING** to enforce its rights, or **TRYING** to collect counsel fees. Evidently the Court is influenced considerably by the financial condition of the company because it finds in its opinion that the company was **INSOLVENT.** This is contrary to the record. The record discloses that at the time of the appointment of the receivers the company had **NET** assets of over $13,000,000 and was amply

solvent (Rec. 3). It is submitted that the finding by this Court that the company was insolvent is wholly erroneous. For the sake of the argument, we might concede that the company was insolvent, yet the law is not changed. There is a long and uninterrupted line of authorities in effect holding that neither the corporation nor those who succeed to its rights, nor its sureties, are heard to object to its bargain either at law or in equity, because of usury.

In re: International Raw Material Corp. (C. C. A. 2) 22 F. (2d) 920.

Curtis v. Leavitt, 15 N. Y. 9.

Stewart v. Bramhall, 71 N. Y. 85.

Gamble v. *Queens County Water Co.*, 123 N. Y. 108; 25 N. E. 201; 9 L. R. A. 527.

Hubbard v. *Tod*, 171 U. S. 474; 19 S. Ct. 14; 43 L. Ed. 246.

The Vigilancia (C. C. A. 2d Cir.) 73 F. 452.

These receivers were appointed by the Court for the purpose of operating the business, not to liquidate the same for the benefit of creditors, and were given power to:

> "Continue the business as a going concern; to operate the same and manage its properties and to do all things necessary in order to preserve said property and continue the business of said defendant, including * * * employing and discharging and fixing the compensation of all necessary employees, agents, servants and attorneys employed by said receivers and purchasing, from time to time on credit or otherwise, such supplies and equipment as may be necessary in the judgment of said receivers to enable them to continue said business as a going concern." (Rec. 8.)

In *Merchants & Manufacturers Securities Company* v. *Johnson*, 69 Fed. (2d) 940, with respect to the status of operating receivers, the Court held:

"The receiver was appointed, not to wind up the affairs of the Oil and Petroleum Companies, but to carry on their business as going concerns. He succeeds to the property of the companies subject to the same liens, limitations, restrictions, or contract rights as obtained at the time of his appointment. He has no greater or different rights than those that might have been asserted by the companies. *Fosdick* v. *Schall*, 99 U. S. 235, 25 L. Ed. 339, *In re*: Gotham Can Co., (C.C.A. 2) 48 Fed. (2d) 540; *Ramsey* v *Marlin Firearms Corp.* (D. C.) 14 Fed. (2d) 314; *Estes* v. *E. B. Estes & Sons*, (D. C.) 24 Fed. (2d) 756.

No mention is made by this Court of the case of *Merchants & Manufacturers Securities Company* v. *Johnson*, 69 Fed. (2d) 940, decided **MARCH 5, 1934**, by the Circuit Court of Appeals for the Eighth Circuit in which case identical contracts were before the Court. Interest at a much higher rate was involved. The proceeding was in equity, exactly like the instant case, and the finance company intervened. Among other things, the petition asked for the recovery of interest and attorneys' fees. The receiver defended on the grounds of usury and that the contracts were harsh, inequitable and unconscionable. Other questions were involved in that case not involved here. The finance company contended that the contracts were to be construed according to the laws of Illinois. With much gusto the receiver argued to the contrary, and relied on the *Reed case* as authority in this circuit. Ignoring that decision the Court held (p. 942):

"By statute of Illinois in effect during the time of all the transactions here involved, it was provided that, 'with respect to money loaned to or in any manner due and owing from a corporation, the parties may stipulate or agree upon any rate of interest whatsoever, and take and pay the same.' Smith-Hurd Rev. St. Ill. 1929, c. 74, Sec.

> 4, Cahill's Illinois Statutes, 1929 Ed., c. 74, Sec. 4, pp. 1594-1595. It is also provided by statute in Illinois that a corporation may 'borrow money at such rate of interest as the corporation may determine without regard to or restrictions under any usury law' of that state, and may 'mortgage or pledge its property, both real and personal, to secure the payment thereof.' Smith-Hurd Rev. St. Ill. 1929, c. 32, Sec. 6, Cahill's Illinois Statutes, 1929 Edition, c. 32, par. 6, p. 670."

And again at page 944 the Court said:

> "Appellant selected the state of Illinois as its principal place of business, as it had a right to do, and, that being its principal place of business, it had a legitimate interest in seeking the benefit of the laws of that state. **AS THE CONTRACTS, CONSTRUED BY THE LAWS OF ILLINOIS, WERE NOT USURIOUS, THE ASSIGNMENTS DELIVERED PURSUANT THERETO WERE LIKEWISE FREE FROM THE TAINT OF USURY."** (Caps ours.)

This Court holds that merely because appellant **ASKED** for interest or compensation as provided for in its contract, and reasonable attorneys' fees, it can recover nothing, the theory being that the rate of interest which the parties agreed upon was unconscionable and so harsh and oppressive as to be unenforceable in a court of equity. The finding by this Court that the insistence of appellant upon its claim for the full rate of interest, plus attorneys' fees, savors too much of the exaction of the pound of flesh from creditors of the alleged insolvent company, is wholly unwarranted. It smacks of a judicial spanking based upon speculation by this Honorable Court, and not based upon anything appearing in the record. The Court, in its opinion, recognizes the force of the arguments advanced by appellant to the effect that in Illi-

nois corporations are precluded from interposing the defense of usury and elaborates on the *International Raw Material Corporation case* decided by the 2nd Circuit.

It is respectfully submitted that in a case where no fraud is charged or proved and where two gigantic corporations deal through respective boards of directors at arm's length, a court of equity has no right to substitute its judgment for the judgment of the contracting parties, simply because the Court feels that the rate of interest is high. In *Poe* v. *Ulray*, 233 Ill. 56, a bill was filed in equity to set aside a lease as void on account of want of mutuality, and because it was unfair, harsh and unconscionable. The Supreme Court of Illinois said (p. 63):

> "So far as the charge that the contract was harsh and unjust is concerned, it may be said that the parties were competent to contract with each other, and neither side can be relieved from their agreements on the ground that they did not use good business judgment in entering into the contract. There is no question of fraud and no charge or evidence of fraud in the case, and where parties who are competent in law and in fact to enter into contracts, freely and voluntarily contract with each other, it is of the utmost importance to them, and the public as well, that their agreement shall be respected and enforced by the courts, and that neither shall be relieved from the obligation of his contract except upon some certain ground deemed valid by the law."

This Court, in its opinion, recognizes that many trial and reviewing Courts have upheld and enforced contracts identical with the one here involved where compensation or interest was calculated, not according to the moneys advanced, but on the amount of paper assigned. The decision in the *Reed case*, and

the opinion in the instant case, are in conflict with the decisions of these various courts. This Honorable Court disagrees with the opinions of the Justices in the First, Second, Third, Fourth, Fifth, Sixth and Eighth Circuits and disagrees with the United States Supreme Court in three important cases. It likewise ignores the Supreme Court of Illinois in its decision upholding the law which permits corporations to pay any rate of interest they choose. The contrary opinions appear as follows:

FIRST CIRCUIT.

Estes v. *E. B. Estes & Son*, 24 Fed. (2d) 756, (Mass. District Ct. 1927).

SECOND CIRCUIT

Ramsey v. *Marlin Firearms Co.*, 14 Fed. (2d) 341, Conn. District Court, 1925.

In re: International Raw Material Company, 22 Fed. (2d) 920 (1927).

In re: Rosenblatt, 299 Fed. 771, District Court of New York.

Boise v. *Talcott*, 264 Fed. 61.

In re: Gotham Can Company, 48 Fed. (2d) 540.

THIRD CIRCUIT.

In the matter of Lutz & Schramm Co., Inc., 38 Am. Bkptcy. 351 (1916), District Ct., Pa.

Brierly v. *Commercial Credit*, 43 Fed. (2d) 730 (1930).

FOURTH CIRCUIT.

Chapman v. *Emerson*, 8 Fed. (2d) 353.

FIFTH CIRCUIT.

United Divers v. *Commercial Credit Co.*, 289 Fed. 316 (1923).

SIXTH CIRCUIT.

LeSeuer v. *Manufacturers Finance Co.*, 285 Fed. 490 (1927).

EIGHTH CIRCUIT.

Merchants & Manufacturers Securities Co. v. *Johnson*, 69 Fed. (2d) 940; decided March 5, 1934.

UNITED STATES SUPREME COURT

Seaman v. *Philadelphia Warehouse Co.*, 274 U. S. 403.

Junction R. R. Co. v. *Bank of Ashland*, 79 U. S. 226 (12 Wall.).

Fosdick v. *Schall*, 99 U. S. 235, 25 L. Ed. 339.

SUPREME COURT OF ILLINOIS

Tennant v. *Joerns*, 329 Ill. 34.

The foregoing decisions, mainly equity cases, clearly hold that in states where corporations are by law precluded from interposing the defense of usury, irrespective of the rate of interest, these contracts are enforceable. To say that the rate of interest specified in the contract is shocking to the conscience of a Chancellor is rather an empty argument. It upsets rules of law firmly established and universally recognized. It takes from the legislature which enacted the law the power to legislate. It destroys contracts obviously legal. It takes away vested rights which the opinion states would be enforced in suits at law. It substitutes the Court's judgment in business transactions for that of the contracting parties, which is most unfair and inequitable. The Court does not indicate what rate of interest corporations may pay without fear of shocking the conscience. At what rate of interest does the conscience of a Chancellor

commence to shock? The argument that a Chancellor's conscience is shocked in a case of this kind, where interest alone is involved and where a corporation is by law precluded from interposing that defense, reminds one of what John Selden once said:

> "Equity in Law is ye same yt ye spirit is in Religion, what ever one pleases to make it. Some times they Goe according to conscience some time according to Law some time according to ye Practice of ye Court.
>
> Equity is A Roguish thing, for Law wee have a measure know what to trust too. Equity is according to ye conscience of him yt is Chancellor, and as yt is larger or narrower soe is equity Tis all one as if they should make ye Standard for ye measure wee call A foot, to be ye Chancellors foot; what an uncertain measure would this be: one Chancellor ha's a long foot another A short foot a third an indifferent foot; tis ye same thing in ye Chancellors Conscience."

With respect to attorneys' fees, it is respectfully urged that the finance company at no time asked for $7,800 as attorneys' fees. The intervening petition requested the allowance of **REASONABLE** attorneys' fees (Rec. 16). One witness gave his opinion as to the value of the services rendered by the attorneys for the finance company. To the contrary, nothing was offered by the receivers. At no time did appellant ask for that amount, and in fact, in its reply brief stated:

> "It is our contention that the appellees, by their action, compelled appellant to resort to the court, thus giving rise to the necessity for the employment of attorneys. Hence appellant is entitled to recover its reasonable attorneys' fees. There is no finding by the trial court fixing the amount of such attorneys' fees, although there is uncontradicted evidence in the record as to the value of the legal services rendered. (Rec. 29) The trial

court could have ignored the testimony of the expert witness as to the value of such services and fixed a reasonable sum, and this Honorable Court (Circuit Court of Appeals) is not bound by the opinion of the experts on this question. Under the authorities, if this court is not satisfied that the amount named by the witness is reasonable in view of all of the elements to be considered in determining that question, it has the power to fix whatever amount it determines to be reasonable. Appellant is not insisting upon the allowance of $7800.00, but is asking for the allowance of a reasonable sum."

The Court, in its opinion states:

"The **INSISTENCE** of appellant upon its claim for the full rate of interest plus attorneys' fees at a preposterous rate when it appeared that there was no more business to be done under the contract, etc."

and again,

"and in addition **TRIES** to collect counsel fees exceeding 177% of the maximum amount claimed against the receiver"

is certainly contrary to the record.

In its opinion this Court concedes that the *International Raw Material Corporation case* is identical with the instant decision and differs only in the amount of attorneys' fees claimed, and in the fact that in this case the finance company is attempting to charge the receivers a higher rate of interest than the rate in fact used between the contracting parties. In the *International case* $500 in fees was allowed, which amount was stated by the parties to be "concededly reasonable." The amount involved in the *International case* does not appear from the record, and it is difficult to determine what basis was used in determining the reasonableness of the fees. This Court

further concedes, in its opinion, that certain courts of appeal in other circuits, in *Estes* v. *E. B. Estes & Sons*, 24 F. (2d) 756; *Lutz & Schramm, Inc.*, 38 A. B. R. 351; *In re* Gotham Can Co., 48 F. (2d) 540; *Ramsey* v. *Merlin Firearms Co.*, 14 F. (2d) 314; *In re* Bernard & Katz, 38 F. (2d) 40, permitted the recovery of some attorneys' fees. Simply because a witness testified that in his opinion $7,800 was a reasonable fee, and notwithstanding the fact that the finance company pointed out to this Court and to the trial Court that Courts are not bound by the opinion of experts on these questions, yet the trial Court and this Honorable Court both conclude that nothing should be allowed. To us the action of this Court seems most inequitable, both on the question of a fair rate of interest and the allowance of reasonable attorneys' fees.

Apparently, to minimize the attorneys' fees, the Court points out as follows:

> "It was shown that there never was any question but that appellant would receive back the balance on its loan."

This, we insist, is incorrect. It was not shown on the trial that there never was any question but that appellant would receive back the balance of the loan, and on the contrary, it affirmatively appears from the record that there was considerable question as to whether or not the loan would be paid in full. The ultimate payment depended upon the collectibility of the assigned accounts from disgruntled distributors and dealers of the product manufactured by the company. This Court has evidently overlooked the testimony of George Whitfield, assistant treasurer of the company, who was employed at the time of the trial by the receivers as their chief accountant, wherein he said:

"At the time of the receivership the collections were practically at a stand-still and so remained for a week or ten days. After that collections were very small on account of the doubt in the minds of the distributors as to whether they should pay their bills or not. Toward thawing out these accounts there was an advertising appropriation of $35,000. There was considerable effort made to collect. Those accounts were placed with different employees of the company, particularly, Mr. Shadley, and the receivers went down and had a meeting with the Eastern distributors in New York in an effort to get loose some of the moneys because collections were just stopped." (Rec. 24.)

This testimony, which stands uncontradicted in the record, demonstrates that the receivers went to considerable lengths to enforce collection of the assigned accounts, and at that time there was grave doubt as to the ultimate collection by the finance company of its accounts in full.

In *Merchants & Manufacturers Securities Company* v. *Johnson*, 69 Fed. (2d) 940, the amount sought to be recovered by the finance company was $32,489.01 and in that case the Court said (p. 945):

"There is no finding by the lower court fixing the amount of such attorney fees, although there is evidence in the record as to the value of the legal services rendered. We have held that the judge of the trial or appellate court is an expert himself, and knows as well as a legal expert what are reasonable attorney fees. Neither the lower court nor this court is bound by the opinion of experts on this question. We are not satisfied that the amounts named by the witnesses called are reasonable, in view of all the elements to be considered in determining that question. As said by the Supreme Court *In re* Gilbert, 276 U. S. 294, 48 S. Ct. 309, 310, 72 L. Ed. 580: 'We are de-

sirous of making it clear by our action that the judges of the courts, in fixing allowances for services to court officers, should be most careful, and that vicarious generosity in such a matter could receive no countenance.'

"The question was not put in issue by any testimony produced by the appellee, presumably on the theory that no amount should in any event be allowed, or on the theory that the court could determine the reasonableness of the attorney fees from the record. But, as said by the Supreme Court in *Newton* v. *Consolidated Gas Co.*, 259 U. S. 101, 42 S. Ct. 438, 439, 66 L. Ed. 844, 'The rights of those who ultimately pay must be carefully protected.'

"We therefore fix the fees to be recovered by appellant at $3,000.00."

A careful study of the opinion convinces us that this Court has misapprehended the record and the law. In this record it is clear that the appellant did nothing more than to file its petition, asking for a construction of its contract. In the stipulation of facts it is stated (Rec. 65), that

"the compensation or interest of $4,394.48 claimed from November 24, 1933 to December 29, 1933 constitutes an average claim of 28.3% interest upon the average net balances outstanding. * * * Computation of interest or compensation at 20% from November 24, 1933 to December 29, 1933 upon outstanding balances of advances would be $3,096.22 or $1,296.26 less than the petitioner is claiming in this proceeding."

The Court could have adopted the practice of the parties prior to the appointment of the receivers and allowed interest at the rate of twenty per cent per annum. The Court misapprehended the record when it found that there never was any doubt but that appellant would receive back the balance of its loan. As

we have herein pointed out, there was grave doubt whether this would ever be done. Certainly, in such an instance, with more than a quarter of a million dollars at stake, appellant was entitled to the benefit of counsel. Under the terms of the contract reasonable attorneys' fees should not be denied simply because a member of the bar testified, in reply to questions put to him, that $7,800, in his judgment, was a reasonable fee, basing his conclusion, no doubt, on the fact that the amount involved was over $250,000, and notwithstanding that the appellant pointed out that the Court was not bound by that testimony and could fix whatever amount it determined to be reasonable. What we are driving at is that it is most unfair to penalize appellant simply because the rate of interest literally provided for by the contract is too high to satisfy the ideas of this Court, and simply because a witness testified that in his opinion $7,800 was a reasonable fee. Being in a court of equity and having committed no iniquity, certainly appellant is entitled to receive equity.

For the reasons herein stated, appellant respectfully petitions this Honorable Court for a rehearing in this matter.

Respectfully submitted,

EDWARD ROTHBART,
NORMAN M. PETERSON,
Attorneys for Appellant.

One N. LaSalle Street,
Chicago, Illinois.

And afterwards, to-wit: On the first day of October, 1934, the following further proceedings were had and entered of record, to-wit:

Monday October 1, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Louis FitzHenry, Circuit Judge.

Manufacturers Finance Company,
5170 *vs.*
Frank M. McKey, as Trustee, Etc.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing in this cause be, and the same is hereby denied.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room, in the City of Chicago, in said Seventh Circuit on the second day of October, 1934, of the October Term in the year of our Lord One Thousand Nine Hundred and Thirty-Four and of our Independence the One Hundred and Fifty-Ninth.

And on the same day, to-wit: On the second day of October, 1934 there was filed in the office of the Clerk of this court a petition for stay of mandate, which said petition is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

P. R. Mallory and Co., Inc., a corporation,
Plaintiff,
vs.
Grigsby-Grunow Company, a Corporation,
Defendant.

Manufacturers Finance Company, a corporation, Intervenor,
Appellant,
vs.
Thomas L. Marshall and LeRoi J. Williams, Receivers for Grigsby-Grunow Company,
Appellees.

Number—5170.

PETITION FOR APPLICATION FOR STAY OF MANDATE.

Now comes Manufacturers Finance Company, Petitioner, by Edward Rothbart and Norman M. Peterson, its attorneys, and makes application for an order of this Honorable Court staying the issuance of mandate in this cause until and including the 30th day of November, 1934, and if on or before the 30th day of November, 1934 there is filed with the Clerk of this Honorable Court a certificate of the Clerk of the Supreme Court of the United States that a petition for a writ of certiorari has been filed therein, the stay shall continue until the final disposition of this case by the Supreme Court.

Wherefore, it is prayed that this application be granted.

EDWARD ROTHBART,
NORMAN M. PETERSON.

Endorsed: Filed Oct. 2, 1934. Frederick G. Campbell, Clerk.

FILE COPY

NOV 9 1
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 522

MANUFACTURERS' FINANCE COMPANY,
Petitioner,

vs.

FRANK M. McKEY, as Trustee in Bankruptcy of the Estate of GRIGSBY-GRUNOW COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

EDWARD ROTHBART,
NORMAN M. PETERSON,
JULIUS M. ROSENFIELD,
of Chicago, Illinois,
SAMUEL A. DEW,
of Kansas City, Mo.,
Counsel for Petitioner.

SUBJECT INDEX.

PAGE

Petition for Writ of Certiorari:

Statement of Matters Involved 2

Reasons for Granting the Writ 5

Brief in Support of Petition 7

Opinions Below 7

Jurisdiction 7

Statement of the Case 7

Specifications of Error 8

Summary of Argument 9

Argument:

I. The decision of the court below is in conflict with the decisions of the Circuit Court of Appeals for the 2nd and 8th Circuits on the same matters 10

II. The court below has decided an important question of local law in conflict with the laws of Illinois enacted by its legislature and construed by its courts 15

III. The court below has decided an important question of general law in conflict with decisions of this and other courts on the same matter 19

Conclusion 26

PAGE

CASES CITED.

Boise v. Talcott, 264 Fed. 61 ..... 13, 21, 24
Brierly v. Commercial Credit Co., 43 Fed. (2nd) 730 22
Chapman v. Emerson, 8 Fed. (2nd) 353 22
Estes v. E. B. Estes & Son, 24 Fed. (2nd) 756 ..... 14, 21, 24
Gunby v. Armstrong, 133 Fed. 417 20
Hagaman v. Reinach, 96 N. Y. S. 719 19
In re: Bernard & Katz, 38 Fed. (2nd) 40 15
In re: Chicago Reed & Furniture Co., 7 Fed. (2nd) 885 ..... 5, 8, 9, 10, 14, 26
In re: Gotham Can Co., 48 Fed. (2nd) 540 ..... 15, 22, 24
In re: Rosenblatt, 299 Fed. 771 ..... 21, 24
International Raw Material Co., 22 Fed. (2nd) 920 ..... 5, 6, 9, 10, 12, 14, 15, 21, 24, 26
LeSueur v. Manufacturers Finance Co., 285 Fed. 490 22
Lloyd v. Scott, 7 Law Ed. 833 19
Matter of Lutz & Schramm Co., Inc., 38 A. B. R. 351, 356 ..... 14, 22, 24
Mason v. United States, 260 U. S. 545, 557 18
Merchants & Manufacturers Sec. Co. v. Johnson, 69 Fed. (2nd) 940 ..... 6, 9, 10, 12, 22, 24
Michigan v. Michigan Trust Co., 286 U. S. 334, 342 18
M. K. & T. Trust Co. v. Krumseig, 172 U. S. 351 ..... 17, 21
Pacific State Sav. Loan & Bldg. Co. v. Green, 123 Fed. 43 ..... 20, 22
People v. Wheeler, 259 Ill. 99 20
Poe v. Ulrey, 233 Ill. 56 ..... 6, 15, 16
Polish Peoples Home Ass'n v. Atlas, 246 Ill. App. 457 12
Ramsey v. Marlin Firearms Co., 14 Fed. (2nd) 314 ..... 15, 21
Simon v. South End Cleaners & Dyers, 246 Ill. App. 14 12
Tennant v. Joerns, 329 Ill. 34 ..... 6, 12, 15
United Divers v. Commercial Credit Co., 289 Fed. 316 22

PAGE

STATUTES CITED.

Cahill's Illinois Revised Statute, 1933 Ed. Ch. 32, Sec. 5(h) P. 725 10

Cahill's Illinois Revised Statute, 1933 Ed. Ch. 74, Sec. 4, P. 1701 11

Jud. Code, Sec. 240 (a) (as amended by Act of February 13, 1925 (28 U. S. C. Sec. 347(a)) 7

TEXTBOOKS CITED.

39 Cyc. 891 ..... 11, 19

66 C. J. 143 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No.

MANUFACTURERS' FINANCE COMPANY,
Petitioner

vs.

FRANK M. McKEY, as Trustee in Bankruptcy of the Estate of GRIGSBY-GRUNOW COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Manufacturers' Finance Company, a corporation, respectfully prays that a writ of certiorari issue to the Circuit Court of Appeals for the Seventh Circuit to review a decree of that Court entered June 1[illegible] 1934,* affirming a decree of the United States District Court for the Northern District of Illinois, Eastern Division. A certified transcript of the record in the case, in

*Petition for rehearing denied October 1, 1934.

cluding the proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with Rule 38, Par. 1, of the Rules of this Court.

STATEMENT OF MATTERS INVOLVED.

In a general creditor's suit brought in the United States District Court for the Northern District of Illinois, Eastern Division, against the Grigsby-Grunow Company (hereinafter termed company) an Illinois corporation (R. 2), temporary receivers were appointed for all the property and the assets of the company (alleged to be worth over $28,000,000, and over $23,000,000 in excess of liabilities (R. 3)), with the usual powers of operating receivers (R. 7-9). On December 5, 1933, the receivers were continued as such, and authorized to continue and operate the business and to maintain the business and properties as a going concern (R. 19).

November 29, 1933, petitioner filed its intervening petition in the main proceeding (R. 13) setting forth that on October 5, 1933, petitioner entered into a contract in writing with the company (R. 46), providing for the purchase by petitioner from the company of such accounts receivable of the company as might be acceptable to petitioner and for the performance of certain services, for which the company agreed to pay compensation to petitioner.* Execution of the contract by the company was approved by its Board of Directors (R. 66).

---

*The contract provided for the sale of accounts receivable to petitioner by the company, for which petitioner agreed to pay the company 100 per cent of the actual net amounts thereof, of which 50 per cent was to be paid upon acceptance of such accounts by petitioner and the remaining 50 per cent, less any deductions and plus any overpayments by debtors, and less the compensation, was to be paid to the company immediately upon payment of the accounts to petitioner, with the proviso that such remainder need not be paid by petitioner so long as any account purchased by petitioner from the company shall be in any manner affected by any breach or violation of any warranty of the company (R. 47).

Petitioner further alleged that pursuant to the terms of said contract it purchased from the company accounts receivable aggregating approximately $1,500,000 (R. 33, 34) and had advanced about $750,000 thereon (R. 31-33), that when the receivers were appointed petitioner held accounts amounting to approximately $551,000 and had paid the company therefor approximately $265,000; that it fully complied with its part of said contract (R. 13), which was not denied, and petitioner prayed that the Court direct the receivers to deliver to petitioner all moneys collected by them, on the accounts assigned to petitioner, until such time as petitioner shall have received the amount due it, together with reasonable attorney's fees, costs and expenses (R. 16).

This intervening petition was necessitated by the refusal of the receivers to pay over any moneys collected on accounts purchased by petitioner, until directed to do so by the Court (R. 43, Par. 13), and the entry of an order, *without notice* to petitioner, to turn over and deliver, *on*

The company warranted there would be no appointment of receivers for the company (R. 48, 49).

The company was given the right to collect such accounts; such right to terminate in the event, among others, of a business failure of the company. Proceeds of collections were to be transmitted to petitioner in kind, each day as received. If incurred, the company was to pay petitioner's attorney's fees, costs and expenses (R. 49). The rate of compensation was 83½ per cent of 1/30 of 1 per cent of the net face amount of accounts for each day from the date of purchase by, until paid to, petitioner (R. 48-62). This compensation was at the rate of 20 per cent per annum (R. 63).

The services to be performed by petitioner consisted of: (1) to furnish by mail to the company credit information in hand about the customers of the company, upon request of the company. (2) Have auditors give to the company the report of such examination therein provided for, with full information and advice as to the most desirable method of keeping the books, records and accounts of the company. (3) Pay for all accounting, postage and credit investigations of accounts purchased or offered for purchase, and upon request give financial and business advice. (4) Accept at par, less exchange, subject to payment, all remittances received through the company. (5) Obtain and have on hand at all times, sufficient funds to make prompt remittance to the company for all acceptable accounts within the limits agreed upon. (6) Supply all forms needed for assignment of accounts. (7) Place petitioner's credit department and collection department at the disposal of the company and permit the company to submit any of its sales contracts with its customers to the general counsel of petitioner for advice and opinion as to form and legality thereof.

the same basis as prior to filing of the bill of complaint to petitioner funds collected by the receivers on assigned accounts (R. 63).

The receivers filed their answer (R. 17) admitting the allegations of the petition, but stated that they had expended time and money in dealing with debtors, which redounded to the benefit of petitioner; that the contract involved merely a loan to the company and that they can see no justification for equitable charge against them upon balances owing as of the date of the receivership *of an interest rate thereupon in excess of the legal maximum rate permitted by the laws of the State of Illinois;* that in the practice between the company and petitioner prior to receivership one-half only of accounts collected was paid to petitioner, the accounts remaining substantially twice in face amount of net remaining advances;* that all collections upon such accounts made since the appointment of the receivers were placed in a special bank account (R. 18, 19).

The receivers on the trial filed an amended answer (R. 21) alleging that all of the principal amount of the advances and interest at the contract rate to date of appointment of the receivers was paid to petitioner, that the receivers could see no justification for equitable charge against them upon balances owing as of the date of the receivership *of an interest rate thereupon in excess of 7 per cent per annum,* and denied that in equity petitioner is entitled to recover its attorney's fees.

During the period from December 14, 1933, to December 29, 1933, on orders entered by the court (R. 64, 65), the

*This was erroneous. The stipulated facts are that when the company received payment from its customers it transmitted each payment in its original form to petitioner. Petitioner would endorse and deposit the remittance thus received and remit to the company the balance of the face value of the accounts not already advanced, that is, 50 per cent less any deductions and plus any overpayments by the respective debtors (R. 43, Par. 10).

receivers paid petitioner $269,700.78 (R. 44, 45, Par. 16-19) which constituted all advances by petitioner to the company, together with compensation at the contract rate to the date the receivers were appointed (R. 45, Par. 20).

The suit proceeded for compensation at the contract rate from November 24, 1933, to December 29, 1933, amounting to $4,394.48 (R. 45) constituting an average claim of 28.3 per cent interest upon average net balances outstanding (R. 65), the rate of return to petitioner being variable under the terms of the contract for the reason that the compensation is calculated upon the net face amount of accounts rather than on money advanced (R. 65, Par. H). Petitioner also claimed reasonable attorneys' fees (R. 29).

The District Court allowed petitioner interest from November 24, 1933, upon outstanding balances of advances made prior to said date by petitioner, at the rate of 7 per cent per annum and denied further relief (R. 76), on the ground that paying 28.3 per cent interest per annum is unconscionable, adhering strictly to the decision of the Circuit Court of Appeals for the Seventh Circuit In re: *Chicago Reed & Furniture Co.*, 7 Fed. (2nd) 885. The Circuit Court of Appeals affirmed the decree (R. 98).

After the appeal was perfected and briefs filed, on motion and stipulation, an order was entered by the Circuit Court of Appeals substituting Frank M. McKey, as Trustee in Bankruptcy of the company, in lieu of said equity receivers (R. 92).

Reasons for Granting the Writ.

1. The decision of the court below in this case is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of In re: *International*

Raw Material Corporation, 22 Fed. (2nd) 920, and the Eighth Circuit in the case of *Merchants & Manufacturers Securities Company* v. *Johnson*, 69 Fed. (2nd) 940,* on the same matters.

2. The court below has decided an important question of local law in conflict with the decision of the Supreme Court of Illinois in *Tennant* v. *Joerns*, 329 Ill. 34 and *Poe* v. *Ulrey*, 233 Ill. 56, the decisions of the Appellate Court of Illinois, and the Statutes of Illinois.

3. The court below has decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Seventh Judicial Circuit sitting at Chicago, Illinois, commanding said court to certify and send to this court on a day to be designated, a full and complete transcript of the record and of all proceedings of the Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this court; that the order of the Circuit Court of Appeals for the Seventh Judicial Circuit affirming the decree of the District Court be reversed and remanded, and that the petitioner be granted such other and further relief as may seem proper.

EDWARD ROTHBART,
NORMAN M. PETERSON,
JULIUS M. ROSENFIELD,
SAMUEL A. DEW,
Counsel for Petitioner.

*Certiorari denied October 8, 1934.

BRIEF IN SUPPORT OF PETITION.

I.

Opinions Below.

The opinion of the District Court has not been officially reported, but is printed in full in the record (R. 70).

The opinion of the Circuit Court of Appeals is reported in 72 Fed. (2nd) 471 (R. 93).

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code as amended by Act of February 13, 1925 (28 U. S. C. Sec. 347A). The date of the decree of the Circuit Court of Appeals for the Seventh Circuit (R. 93-97) sought to be reviewed was June 19, 1934. The date of the order of said Circuit Court of Appeals denying the petition for rehearing was October 1, 1934 (R. 117).

III.

Statement of the Case.

The facts have been fully set forth under the caption "Statement of Matters Involved" which is hereby adopted.

IV.

Specifications of Error.

The Circuit Court of Appeals erred:

1. In not allowing compensation at the rate provided for in the contract, subsequent to November 24, 1933, and until petitioner had been paid in full its advances.

2. In not allowing petitioner a reasonable amount for attorney's fees incurred in the prosecution of its intervening petition, as prayed for in said intervening petition.

3. In affirming the decree of the District Court.

4. In not overruling *In re*: Chicago Reed & Furniture Company, 7 Fed. (2nd) 885 (7th Circuit).

SUMMARY OF ARGUMENT.

I.

Adhering to its former decision in *In re*: Chicago Reed & Furniture Co., 7 Fed. (2nd) 885, the court decided that petitioner could not enforce a contract under which an Illinois corporation agrees to pay interest in excess of 7 per cent per annum. The decision in the *Reed* case was criticized in *In re*: International Raw Material Co., 22 Fed. (2nd) 920 (2nd Circuit) and not followed in *Merchants & Manufacturers Securities Co.* v. *Johnson,* 69 Fed. (2nd) 940 (8th Circuit).

II.

The policy of the Illinois law as reflected by legislative enactments and decisions of the Supreme Court, permit corporations to pay any rate of interest that they may determine. The construction placed upon such statutes by state courts of Illinois are binding on Federal courts located in Illinois.

III.

Without any proof or claim of fraud or mistake, the court holds that it is not obliged to enforce a contract under which an Illinois corporation agrees to pay 28.3 per cent as interest, solely on the ground that such contract is harsh and oppressive and shocks the conscience.

ARGUMENT.

I.

The decision of the Court below in this case is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of In re: International Raw Material Corporation, 22 Fed. (2nd) 920, and the Eighth Circuit in the case of Merchants & Manufacturers Securities Company v. Johnson, 69 Fed. (2nd) 940, on the same matters.

As appears from the statement of facts, the vital question presented to the District Court and to the Circuit Court of Appeals was whether an Illinois corporation may stipulate or agree upon any rate of compensation or interest and take and pay the same, and whether such contract is binding upon receivers for the corporation appointed by a court of equity.

By the statutes of Illinois in effect during the time of all the transactions here involved it was provided that a corporation may "borrow money at such rates of interest as the corporation may determine, without regard to the restrictions of any usury law of the state." (Cahill Illinois Rev. Statutes, 1933 Ed. Ch. 32, Sec. 5 (h) page 725). This statute is almost identical with the enactment of 1919. From 1919 to 1925 there were no decisions either in the State courts of Illinois or in the Federal courts located in Illinois construing the above statute. In 1925 the Circuit Court of Appeals for the Seventh Circuit decided In re: *Chicago Reed & Furniture Company,* 7 Fed. (2nd) 885. That case involved a loan of $1,700 on chattel mortgage security. Notes aggregating $2,000 payable in twelve

monthly installments, and bearing interest at 7 per cent were given. The borrower was adjudicated bankrupt and on a petition filed by the holder of the security, relief was granted, except as to the item of $300 claimed to be a commission. The Court said:

> "It is conceded that the $300 must be regarded as compensation to petitioner for the use of the money, and that but for paragraph 7 of section 6 of the General Corporation Act of Illinois, approved June 28, 1919 (Laws, 1919, p. 318), the Illinois usury laws would have prevented recovery of the amount in question. Petitioner maintains, and respondent denies, that the paragraph referred to permits Illinois corporations to make valid loans at any rate of interest for which they see fit to contract. The paragraph mentioned provides that corporations shall have power 'to borrow money at such rate of interest as the corporation may determine, without regard to, or restrictions under any usury law of this state, and to mortgage or pledge its property, both real and personal to secure the payment thereof.'
>
> To what extent, if at all, this has enabled corporations lawfully to bind themselves to pay interest on loans at rates beyond the theretofore statutory maximum has not to our knowledge been decided by the Illinois courts. But in our view of the case this question is not of necessity here involved. The later statute may or may not have repealed *pro tanto* the usury law of the state, but it did not abrogate the rule that courts of equity will not lend their aid to enforce contracts which upon their face are so manifestly harsh and oppressive as to shock the conscience. 39 Cyc. 891."

Since July 1, 1925, the Interest Acts of Illinois have provided:

> "With respect to money loaned to or in any manner due and owing from a corporation, the parties may stipulate or agree upon any rate of interest whatsoever, and take and pay the same." (Cahill's Illinois Revised Statutes, 1933 Ed. Ch. 74, Sec. 4, p. 1701.)

On February 24, 1928, in *Tennant* v. *Joerns,* 329 Ill. 34, the Supreme Court sustained the constitutionality of the 1919 Act, permitting corporations to borrow money at such rates of interest as they may determine, and in effect held that said statute withdrew from the operation of the Interest Act loans to corporations which would otherwise be unlawful.

Subsequently, the Appellate Court of Illinois, in *Simon* v. *South End Cleaners & Dyers,* 246 Ill. App. 14, and *Polish Peoples Home Association* v. *Atlas,* 246 Ill. App. 457, held that by reason of the statute corporations could not defend on the ground of usury.

On March 5, 1934, the Circuit Court of Appeals for the Eighth Circuit rendered its decision in *Merchants & Manufacturers Securities Co.* v. *Johnson,* 69 Fed. (2nd) 940.* In that case identical contracts were before the court. A high rate of interest was involved. The receiver defended mainly on the grounds of usury and that the contracts were harsh, inequitable and unconscionable. The securities company contended that the contracts were to be construed according to the laws of Illinois, where usury was no defense. The receiver argued to the contrary and relied on the *Reed* case as the authority in the Seventh Circuit. Ignoring that decision, the court held that the contracts, construed by the laws of Illinois were not usurious and that the receiver succeeded to the property subject to the same contract rights as obtained at the time of his appointment.

The *Reed* case was severely criticised by the Circuit Court of Appeals for the Second Circuit in *In re: International Raw Material Corporation,* 22 Fed. (2nd) 920 (1927) where the court says, page 923:

> "(1) Can an agreement by a corporation to pay a rate of interest or commission in excess of the legal rate be held invalid by a court of bankruptcy, having

*Certiorari denied October 8, 1934.

the custody of a fund which is collateral security for the performance of the agreement, upon the ground that a lien upon that fund for an excessive rate is unconscionable and should not be sanctioned by a court of equity? * * *

The contention that an agreement by the bankrupt corporation to pay more than 6 per cent, be it called commissions or interest, was illegal, and should not be enforced against the collateral, is largely based upon the recent decision of the Circuit Court of Appeals of the Eighth (should be Seventh) Circuit in the case of *In re*: Chicago Reed & Furniture Co., *supra*. The court there held that, irrespective of the usury law of Illinois, a court of bankruptcy would not enforce an agreement which in that case involved payment from the proceeds of mortgaged property of an amount due for commissions and interest calculated at a rate of over 40 per cent per annum. Here there seems to be no doubt that the parties agreed among themselves to pay 6 per cent as interest on the loan and the additional sum of 1½ per cent per month as a so-called commission. We know of nothing to prevent such an agreement. The New York statute provides that no corporation shall interpose the defense of usury, and this has been held in effect to repeal the usury laws so far as the contracts of corporations are concerned. Neither the corporations, nor those who may succeed to their rights, nor their sureties, are heard to object to their bargain, either at law or in equity, because of usury. *Curtis* v. *Leavitt,* 15 N. Y. 9; *Stewart* v. *Bramhall,* 74 N. Y. 85; *Gamble* v. *Queens County Water Co.,* 123 N. Y. 108, 25 N. E. 201, 9 L. R. A. 527; *Hubbard* v. *Tod,* 171 U. S. 474, 19 S. Ct. 14, 43 L. Ed. 246; *The Vigilancia* (C. C. A. 2d Cir.), 73 F. 452.

In *Boise* v. *Talcott,* 264 Fed. 61, this court allowed interest charges of 6 per cent, plus commissions of 10 per cent for acting as selling agents, together with a discount of 10 per cent on each loan to the bankrupt. There seems no justification in nullifying the agreement of the parties here, because the interest and

commissions which they deliberately arranged were too large to satisfy the ideas of a court. Here, as in other similar cases, the competition of the market fixes rates. The statute has not attempted to control usury contracts made by corporations. Any decision by a court as to what would be a reasonable rate would either have to vary with the kind of security furnished or else be a mere doctrinaire pronouncement. Corporate contracts to pay more than the statutory rate of interest have been, and we believe should be, left to the agreement of the parties, and not disturbed, in the absence of fraud or duress."

The Court of Appeals in this case recognizes the force and logic of the argument advanced by the Second Circuit in the *International Raw Material* case, but refuse to follow it. The Court says:

"We concede that the International Raw Material Corporation case is quite similar in many respects to the case at bar. They do differ in the amount of attorney's fees claimed and in the fact that in the instant case the finance company is attempting to charge the receivers a rate considerably higher than the rate in fact used between the contracting parties, which was the minimum rate reserved by the contract. * * *

We can see no reason under the circumstances of this case for overruling the principle laid down in the Chicago Reed & Furniture Company case, *supra*, in favor of that enunciated in the International Raw Material Corporation case, *supra*." (R. 97.)

On the point that Illinois corporations cannot defend on the ground of usury in view of the statutes and may recover interest and attorney's fees in accordance with the terms of the contract, the Court of Appeals admit that the weight of authority is with the petitioner when it says:

"It (petitioner) finds substantial support for this argument in certain cases cited by it, (*Estes* v. *E. B. Estes & Sons*, 24 F. (2d) 756; *Lutz & Schramm, Inc.*,

38 A. B. R. 351; *In re*: *International Raw Material Co.*, 22 F. (2d) 920; *In re*: *Gotham Can Co.*, 48 F. (2d) 540; *Ramsey* v. *Marlin Firearms Co.*, 14 F. (2d) 314; See also *In re*: *Bernard & Katz*, 38 F. (2d) 40, not cited by appellant), the strongest of which for its purposes is *In re*: *International Raw Material Corporation*, 22 F. (2d) 920, decided by the Court of Appeals for the Second Circuit." (R. 96.)

A serious conflict exists between the Seventh Circuit and the Second and Eighth Circuits on the same matters, which should be corrected by this Honorable Court.

II.

The Court below has decided an important question of local law in conflict with the decisions of the Supreme Court of Illinois in Tennant v. Joerns, 329 Ill. 34, and Poe v. Ulray, 233 Ill. 56, the decisions of the Appellate Courts of Illinois and the Statutes of Illinois.

(A) The Statutes as construed by the Supreme Court of Illinois are binding on a Federal Equity Court sitting in Illinois.

The policy of the Illinois law was established by the legislature when it adopted statutes permitting corporations to pay any rate of interest and when the reviewing courts of Illinois sustained these statutes and enforced contracts by corporations to pay substantial rates of interest.

In *Tennant* v. *Joerns*, 329 Ill. 34, it was urged that the Act authorizing corporations to borrow money at any rate of interest is usurious, immoral in principle and contrary to public policy. With respect to that phase of the matter, the court said, page 40:

"What constitutes usury is determined by the legislature and varies in different States. It has varied

at different times in this State. This court held in *People* v. *Wheeler,* 259 Ill. 99, that usury of itself is not immoral. 'It would be contrary to common experience to say that a man who lends money at usurious rates is for that reason, alone, not a man of good moral character.' Usury is not a crime in itself, and its defense to a suit depends upon the expressed statutes. It is not founded on a common law right and is clearly within the power of the legislature to take it away. (*Rosa* v. *Butterfield,* 33 N. Y. 665; *Southern Life Ins. and Trust Co.* v. *Packer & Prentice,* 17 *id.* 51; *Town of Danville* v. *Pace,* 25 Gratt. i, 18 Am. Rep. 663.)"

The central point of the decision of the Court of Appeals in this case and in the *Reed* case is that courts of equity will not lend their aid to enforce a contract which, by reason of a high rate of interest, is harsh, oppressive and shocks the conscience. The court will note from the pleadings and proof that there was no charge or intimation by the receivers of fraud, deceit or overreaching, and the record discloses that this contract was entered into between two large corporations dealing through their respective boards of directors at arm's length. It is the policy of the Illinois law to uphold such contracts in the absence of fraud. In *Poe* v. *Ulrey,* 233 Ill. 56, the court says:

"So far as the charge that the contract was harsh and unjust is concerned, it may be said that the parties were competent to contract with each other, and neither side can be relieved from their agreements on the ground that they did not use good business judgment in entering into the contract. There is no question of fraud and no charge or evidence of fraud in the case, and where parties who are competent in law and in fact to enter into contracts, freely and voluntarily contract with each other, it is of the utmost importance to them, and the public as well, that their agreement shall be respected and enforced by the

courts, and that neither shall be relieved from the obligation of his contract except upon some certain ground deemed valid by the law."

(A) The statutes as construed by the Supreme Court of Illinois are binding on a Federal Equity Court sitting in Illinois.

This court has repeatedly held that the statutes of a state are binding upon Federal courts sitting within the state, provided such statutes do not enlarge or diminish Federal equity jurisdiction. In *M. K. & T. Trust Company* v. *Krumseig,* 172 U. S. 351, this court considered the question of whether the statutes of a state defining the rights of the parties under a contract for a high rate of interest was binding on Federal equity courts. The holding is that all questions of the rights of the parties under such contracts depend upon the laws of the state where the transaction took place and that Federal courts are bound by statutes and decisions of the courts of such state on that subject, even though such statute and decisions appear contrary to fundamental principles of equity, and said, at page 355:

> "Usury is, of course, merely a statutory offense, and Federal courts in dealing with such a question must look to the laws of the state where the transaction took place, and follow the construction put upon such laws by the state courts. *DeWolf* v. *Johnson,* 10 Wheat. 367; *Scudder* v. *Union National Bank,* 91 U. S. 406."

And again, page 359, says:

> "If the state, whether New York, Arkansas, Minnesota or others, think that the evils of usury are best prevented by making usurious contracts void, and by giving a right to the borrowers to have such contracts unconditionally nullified and cancelled by the courts, such a view of public policy, in respect to contracts made within the state and sought to be enforced therein, is obligatory on the Federal courts, whether

> acting in equity or at law. The local law, consisting of the applicable statutes as construed by the Supreme Court of the State, furnishes the rule of decision."

In *Michigan* v. *Michigan Trust Company,* 286 U. S. 334, in an equity proceeding, this court said, page 342:

> "Choice, as it happens, is not free, for our task is to ascertain the meaning of a Michigan statute, and as to the courts of the state, if they have spoken, pronounce the final word."

In *Mason* v. *United States,* 260 U. S. 545, this court said, at page 557, *et seq.*:

> "Subject to certain exceptions the statutes of a State are binding upon the Federal courts sitting within the State as they are upon the state courts. One of the exceptions is that these statutes may not be permitted to enlarge or diminish the Federal equity jurisdiction. * * * But while the power of the courts of the United States to entertain suits in equity and to decide them cannot be abridged by state legislation, the rights involved therein may be the proper subject of such legislation. * * * It is undoubtedly true that the United States courts sitting as courts of equity have a freedom of action in this respect which they do not possess as courts of common law, and that, as a general proposition, the equity jurisdiction of the Federal courts cannot be limited or restrained by a state. * * * But these decisions relate to the practice, the impairing of jurisdiction, rather than to the determination of the rights of parties after jurisdiction has been acquired."

The conclusion is irresistible that the District Court and the court below were bound by the statutes and decisions of the Illinois courts which they refused to follow in favor of inapplicable rules in equity.

III.

The court below has decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

The opinion of the court below assumes that there is some equitable or moral standard by which rates of compensation or interest may be measured in a Federal court of equity, without reference to the statutes of the individual state, and that a court of equity may properly decline to enforce a contract, free from fraud, for an agreed rate, merely because such rate is too high in the opinion of the court, and disregard the statutes of the State where the transaction took place, which expressly permits *any* rate upon which the parties may agree.

In the *Reed* case, the court cites 39 Cyc. 891 as authority for its conclusion that equity will not enforce a contract where the rate of interest to be paid by a corporation which cannot legally defend on the ground of usury is so harsh and oppressive as to shock the conscience. That section is now found in 66 C. J. 143 under the title *"Oppressive Contracts as Distinguished From Usurious Contracts."* There are several cases cited under this heading, but none of them grant relief to a corporation. One of the cases cited, *Hagaman* v. *Reinach,* 96 N. Y. S. 719 (1905) quotes the opinion of this court in *Lloyd* v. *Scott,* 7 L. Ed. 833:

> "The act of usury has long since lost that deep moral stain which was formerly attached to it; and is now generally considered only as an illegal or immoral act because it is prohibited by law."

To sustain the view of the court below, it necessarily had to ignore the contract, freely and voluntarily entered into between the parties. There is nothing in the Illinois

law fixing 7 per cent interest as either a minimum or a maximum rate to be paid by a corporation, and that, we submit, is a material change of the terms of the contract not contemplated by either of the parties.

In *Pacific State Savings Loan & Bldg. Co.* v. *Green,* 123 Fed. 43 (9th Cir.), the court says:

> "The general rule is, we think, well settled that a court of equity is not authorized to set aside and annul a contract made by parties with full knowledge of all the terms and conditions of the same, without it is clearly and satisfactorily shown that there was fraud, oppression, or undue advantage taken with reference to its execution." (Citing cases.)

To the same effect see *Gunby* v. *Armstrong,* 133 Fed. 417 (5th Cir.), and cases cited therein, at page 432.

The question of whether or not this contract was unconscionable is inseparably connected with the substantive law and public policy of the State of Illinois. Usury has never been considered *malum in se,* but merely *malum prohibitum.* As was said in the case of *People* v. *Wheeler,* 259 Ill. 99, at page 101:

> "Usury is not an offense against the law of Illinois. Of itself it is not immoral."

The legislature of Illinois has given a substantive right to corporations to pay and receive any rate of interest they see fit, and no court should abrogate this right merely because a particular contract may seem to be improvidently made. The public policy of Illinois as reflected by its legislative enactments makes all such contracts legal, valid and enforceable and the question of whether or not the interest charge is 20 per cent or 28 per cent is immaterial.

We submit that the decision of the Court of Appeals is without foundation in law or in logic. Petitioner was not asking for equitable relief but was merely asserting its

legal rights. It was not in a court of equity by choice but was forced into said proceeding by reason of the appointment of receivers, who were collecting and retaining petitioner's money, and by reason of the injunction entered by the trial court restraining all persons from interfering with the receivers and the estate (R. 9).

This Court, in *M. K. & T. Trust Company* v. *Krumseig*, 172 U. S. 351, at page 358, says:

> "But it is strenuously argued, and of that opinion was Circuit Judge Sanborn in the present case, that Federal courts, in the exercise of their equity jurisdiction, do not receive any modification from the legislation of the States or the practice of their courts having similar powers, and that consequently no act of the legislature of Minnesota could deprive the Federal courts sitting in equity of the power or relieve them of the duty to enforce and apply the established principle of equity jurisprudence to this case that he who seeks equity must do equity, and to require the appellees to pay to the appellant what they justly owe for principal and lawful interest as a condition of granting the relief they ask.
>
> "We think it a satisfactory reply to such a proposition that the complainants in the present case were not seeking equity, but to avail themselves of a substantive right under the statutory law of the State."

We pointed out in the petition for rehearing (R. 101) that contracts of the type here involved were held valid, binding and enforceable not only as to the corporation but receivers for such corporation as well. The decision of the court below is in direct conflict with the decisions of District and Circuit Courts in every other circuit that has ruled on the matter. The contrary decisions appear as follows.*

---

*Estes v. E. B. Estes & Son, 24 Fed. (2nd) 756 (Mass. Dist. Ct.); International Raw Material Co., 22 Fed. (2nd) 920 (2nd Cir.); Ramsey v. Marlin Firearms Co., 14 Fed. (2nd) 314 (Conn. Dist. Ct.); In re: Rosenblatt, 299 Fed. 771 (Dist. Ct. of New York); Boise v. Talcott, 264 Fed. 61

Petitioner sought to recover reasonable attorney's fees pursuant to the terms of the contract. When the petition was filed there was an indebtedness owing on the contract in excess of $250,000. The receivers were making collections and refused to turn over such collections to the petitioner until directed to do so by the court (R. 43, Par. 13), thereby making it imperative for petitioner to engage counsel. The receivers, immediately upon being appointed, procured an order of the trial court *without notice to petitioner* authorizing the receivers to turn over to the petitioner funds collected by the receivers on assigned accounts *on the same basis as prior to filing of the bill of complaint,* which order was construed by petitioner to mean that it would be required to return to the receivers one-half of the collections received on assigned accounts. Petitioner contended, and rightfully so, that it could retain all of the collections until payment in full of its indebtedness was made. The contract authorizes this action in the event that the company or any of the accounts are in default (R. 47), and the appointment of the receivers constituted a default under such contract (R. 48, Par. 5, Sec. 2). Aside from the strict construction of the contract, the record discloses that the accounts petitioner held were merely claims against dealers and distributors of the company for merchandise sold. At the time the intervening petition was filed it was very doubtful whether the full amount owing to petitioner would be paid. The receivers were evidently in doubt about this matter, because the court entered an order on their petition (R. 61) authorizing the expenditure of $35,000 for "further adver-

---

(C. C. A. 2nd); In re: Gotham Can Co., 48 Fed. (2nd) 540 (C. C. A. 2nd); In the matter of Lutz & Schramm Co., Inc., 38 A. B. R. 351 (Dist. Ct. Pa.); Brierly v. Commercial Credit Co., 43 Fed. (2nd) 730 (C. C. A. 3rd); Chapman v. Emerson, 8 Fed. (2nd) 353 (C. C. A. 4th); United Divers v. Commercial Credit Co., 289 Fed. 316 (C. C. A. 5th); LeSueur v. Manufacturers Finance Co., 285 Fed. 490 (C. C. A. 6th); Merchants & Manufacturers Securities Co. v. Johnson, 69 Fed. (2nd) 940 (C. C. A. 8th); Pacific State Savings Loan & Bldg. Co. v. Green, 123 Fed. 43 (C. C. A. 9th).

tising" for the month of December, 1933, and such $35,000 was paid to the distributors in the form of credits on their accounts for the purpose of inducing the distributors to "continue in the fold of Grigsby-Grunow" (R. 25). The chief auditor for the receivers testified:

> "There was a price concession on one particular line of a substantial amount. In fact, in my opinion, there was practically everything being done, a combination of items, to thaw out the accounts. There were price concessions. We took back merchandise and we put through special allowances. It was necessary to get some money and so we strove to get them." (R. 24.)

With this uncertainty present, petitioner was unwilling to return to the receivers 50 per cent of moneys collected on such accounts receivable and if they were required to obey and follow the order (R. 63) their position might have been seriously endangered. Obviously, in these circumstances, it became necessary for petitioner to engage counsel to protect its interests.

On behalf of petitioner, one witness testified that in his opinion a reasonable attorney's fee would be $7,800 (R. 29) and no evidence was offered to the contrary. Petitioner throughout has requested a reasonable fee and never insisted upon the allowance of $7,800. Notwithstanding such testimony, the trial court in its findings of fact and conclusions of law (R. 75) finds that:

> "No evidence was introduced as to the amount of reasonable attorney's fees, if any, for counsel for intervening petitioner for services necessarily rendered herein."

In its opinion, the trial court said:

> "Perhaps the court should say further concerning the claim for attorney's fees, that the court cannot see any reason for intervening petitioner having obligated itself for attorney's fees in any considerable amount." (R. 72.)

And in the decree, interest is allowed at the rate of 7 per cent per annum and all further relief prayed for in the intervening petition was denied (R. 76).

The court below draws its own conclusion that the attorney's fees amounted to 177 per cent of the maximum amount claimed against the receiver (R. 97) which we submit is wholly incorrect. In numerous cases under similar contracts, courts have allowed attorney's fees, in equity and bankruptcy cases.*

In *Boise* v. *Talcott,* 264 Fed. 61, the court says:

> "The items allowed in payment of attorneys' fees and disbursements are fully covered by the contract which provides for payment of 'all legal expenses and reasonable counsel fees.' "

In the case of *In re: International Raw Material Company,* 22 Fed (2nd) 920, the Circuit Court of Appeals for the Second Circuit approves the payment of attorney's fees under a provision in a contract which says:

> "The bankers may employ counsel to advise them and charge the account of the client with attorney's fees actually incurred or reasonable prospective attorney's fees and the amount thereof shall be added to the lien of the bankers and be secured by collateral."

In the matter of *Lutz & Schramm Company, Inc.,* 38 Am. Bankruptcy Reports, 351, the court says:

> "As the contract provides for attorney's fees and the amount charged is not claimed to be out of proportion to the services rendered, I am also of opinion that this claim should be allowed."

In the very latest expression on the subject, *Merchants & Manufacturers Securities Co.* v. *Johnson,* 69 Fed. (2nd)

*In re: International Raw Material Company, 22 Fed. (2nd) 920; Boise v. Talcott, 264 Fed. 61; Estes v. E. B. Estes & Son, 24 Fed. (2nd) 756; Matter of Lutz & Schramm Company, Inc., 38 A. B. R. 351; In re: Gotham Can Company, 48 Fed. (2nd) 540; In re: Rosenblatt, 299 Fed. 771.

940 (8th Circuit), the amount sought to be recovered by the finance company was $32,489.01, and the trial court denied attorney's fees. On appeal, the Circuit Court reversed that decree and said, page 945:

> "There is no finding by the lower court fixing the amount of such attorney's fees, although there is evidence in the record as to the value of the legal services rendered. We have held that the judge of the trial or appellate court is an expert himself and knows as well as a legal expert what are reasonable attorney's fees. * * * The question was not put in issue by any testimony produced by appellee (receiver) presumably on the theory that no amount should in any event be allowed, or on the theory that the court could determine the reasonableness of the attorney's fees from the record. * * * We therefore fix the fees to be recovered by appellant at $3,000.00."

CONCLUSION.

The Circuit Court of Appeals, when it decided the *Chicago Reed & Furniture Company* case, 7 Fed. (2nd) 885, seriously erred and when it decided the instant case and adhered to its former decision, it disregarded the weight of authority to the contrary. Hence, a very unsatisfactory precedent has been established in the Seventh Circuit. The uncertainty existing by reason of the instant opinion can be settled by this court's ruling. The ruling that courts of equity need not enforce a contract where the rate of interest, otherwise lawful, is higher than the court thinks should be allowed, is an important matter of general law which we believe has been improperly declared and should not be permitted to stand. For which reasons petitioner submits that the writ of certiorari should be granted.

Respectfully submitted,

EDWARD ROTHBART,
NORMAN M. PETERSON,
JULIUS M. ROSENFIELD,
SAMUEL A. DEW,
Counsel for Petitioner.

FILE COPY

FILED
DEC 3
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 522

MANUFACTURERS' FINANCE COMPANY,
Petitioner,

vs.

FRANK M. McKEY, as Trustee in Bankruptcy of the Estate of GRIGSBY-GRUNOW COMPANY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

EDWARD ROTHBART,
NORMAN M. PETERSON,
JULIUS M. ROSENFIELD,
of Chicago, Illinois,
SAMUEL A. DEW,
of Kansas City, Mo.,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 522

MANUFACTURERS' FINANCE COMPANY,
Petitioner,

vs.

FRANK M. McKEY, as Trustee in Bankruptcy of the Estate of GRIGSBY-GRUNOW COMPANY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Respondent, at the beginning of his brief, states that the Grigsby-Grunow Company was adjudicated bankrupt March 10, 1934.

The record shows that respondent was appointed as trustee under a petition in bankruptcy filed February 18, 1934 (R. 90) after this matter was disposed of in the trial court (R. 83) and the record filed in the Circuit Court of Appeals (R. 83). When the decree of the District Court was entered all that was before the court was the intervening petition and the receivers' answers. No question of the solvency of the company was raised in the pleadings, evidence or stipulations of fact.

We desire to point out that the main suit was filed November 23, 1933 by a creditor, with a claim in excess of $3,000 who prayed for the appointment of a receiver (R. 2). The following day the company answered, admitting the averments of the bill and joined in the prayer thereof (R. 6), whereupon the District Court appointed the vice president of the company (R. 52) and counsel for respondent, as receivers (R. 7) who qualified the same day (R. 10). The bill of complaint alleged that the company had assets of over $28,000,000 and over $23,000,000 in excess of liabilities (R. 3). This appeal was perfected, briefs were filed and the matter set for oral argument in the Court of Appeals on April 27, 1934 (R. 88) on which date leave was given to respondent to become substituted as a defendant in lieu of the equity receivers (R. 90).

The point we are making is that this matter was wholly disposed of in the District Court and this appeal was prayed, allowed and perfected before the adjudication in bankruptcy was made. Obviously the purpose of mentioning the adjudication in bankruptcy at the commencement of respondent's brief is to gain a sympathetic response. The company's financial condition was not a matter that was considered by the trial court when the decree was entered. The company's strong financial condition was apparently known to the trial court, for nowhere in its memoranda opinion (R. 70), findings of fact (R. 73) and conclusions of law (R. 75) does it appear that the company was insolvent. On the question of insolvency, the Circuit Court of Appeals had before it this record which affirmatively shows the Grigsby-Grunow Company to be amply solvent, and nowhere in the record is there any evidence otherwise (excepting by inference, resulting from the substitution), yet in several instances the Court of Appeals refers to the insolvent company. This fact, improperly before the Court of Appeals no doubt influenced the court in making its decision.

The gist of respondent's brief is that because petitioner *attempted* to collect interest and attorney's fees in accordance with the terms of the contract, this fact was so shocking to the conscience of the chancellor, that it justified the disallowance of all interest above seven per cent and that because the controversy involved only $3,096.22 (which we deny) the disallowance of attorney's fees was proper. At no time did respondent contend that there was any fraud, accident or mistake in the execution of the contract, or otherwise.

The trial court in its memoranda opinion (R. 70) conceded all of the contentions of petitioner (R. 71), but denied relief on the ground that (*a*) petitioner did not come into a court of equity with clean hands; (*b*) the receivers expended $35,000 for advertising, the purposes of which were to maintain the good will of the company and to preserve its receivables as live and valuable assets; and (*c*) petitioner's request for contract interest and attorney's fees was unconscionable.

The Court of Appeals evidently did not regard any of the foregoing contentions, excepting the last one and its opinion centers around the proposition that because appellant *attempted* to collect interest and attorney's fees in accordance with the terms of the contract, from an *insolvent* company, equity requires the disallowance of all interest in excess of seven per cent and the refusal of any attorney's fees.

Respondent gives three reasons on page 4 of his brief, why petitioner's claims were shocking to the court:

Respondent's Point I.

It evidenced an assertion of, and an insistence upon, a contract claim upon a basis more onerous than the petitioner had asserted against the company itself, and in excess of its profits under its contract as the petitioner and the company had themselves operated under that contract.

The contract provides for payment of interest or compensation calculated, not on the moneys advanced, but on the face amount of the accounts assigned and the rate was ten per cent of the face amount of accounts. Petitioner advanced fifty per cent of the amount of such accounts at the time of purchase and paid the balance to the company as the accounts were collected. This made the rate of return to petitioner twenty per cent per annum on the money advanced, without regard to the services rendered (R. 43, Par. 9; R. 47, 48). The contract permitted the company to make the collections on such assigned accounts and each day the company remitted such collections in kind to petitioner who, on receipt thereof, paid the balance of the purchase price.

Upon being appointed, the receivers promptly refused to carry out the terms of the contract and instead converted such collections to their own use, depositing the same in their special account (R. 19). This action by the receivers necessarily caused the rate of interest or compensation to increase, due to the fact that the return to petitioner was calculated on the face amount of accounts, thus the return was based on $550,000 in outstanding accounts each day until payment by the receivers was made to petitioner.

Several weeks elapsed from the date of the appointment before petitioner was able to procure any portion of the collections from the receivers, and then only on an order

of court. The receivers, on December 14, 1933 had $223,-973.55 of such collections which they resisted paying over and the District Court directed them to pay only $140,000 thereof, over the objections of the attorneys for the petitioner, and thereafter on December 22nd, there was a similar occurrence (R. 65). By reason of the receivers' actions in withholding such collections the rate increased from 20 per cent to an average of 28.3 per cent. This, respondent contends, is sufficient justification for denying to petitioner all of its rights under the contract. It might not be amiss at this point to suggest that the District Court might nave allowed interest at the rate in effect prior to the appointment of the receivers, but this the court did not see fit to do apparently on the general ground that all interest in excess of seven per cent is shocking to the conscience of the chancellor, and equity may refuse relief.

Respondent argues at page 2 of his brief that this was a complicated contract, apparently to show that the receivers did not understand it and did not know that the rate of interest was increasing by reason of their retaining the collections. In this connection, may we call the court's attention to the record, which shows that one of the receivers, LeRoi J. Williams, was the vice president of the Grigsby-Grunow Company and signed the contract (R. 52) and the other receiver, Thomas L. Marshall, who now appears as attorney for the respondent, and during the time of the receivership was the attorney for and director of Manufacturers & Dealers Finance Corporation (R. 29) to whom the Grigsby-Grunow Company had also sold certain of its accounts receivable, presumably under a similar contract, and was also the chief witness for the receivers (R. 29). To these gentlemen, one the head of a corporation which on September 9, 1933 had assets of over $20,000,000, and the other a member of the Bar and attorney and director of a finance company engaged in a business similar to petitioner, we submit the

contract was not complicated and was well understood by them. The record further discloses that the receivers, the day following their appointment, and *without notice* to petitioner, procured the District Court to enter an order authorizing the receivers to turn over to the petitioner funds collected by the receivers on assigned accounts *on the same basis as prior to the filing of the bill of complaint*, namely: to return to the receivers one-half of the collections received on assigned accounts (R. 63). Then the record shows that petitioner engaged counsel who immediately conferred with the receivers (R. 63). The receivers suggested that the petitioner pay over to the receivers one-half of assigned accounts collected, or permit the receivers to retain one-half thereof, which was not agreeable, petitioner contending that under the terms of the contract, various defaults had occurred and that its position was extremely hazardous, due to the type of accounts it had purchased. The receivers then had $50,000 in cash collected on such assigned accounts and the prospect of securing $100,000 more within a short time. Petitioner's counsel offered to take this $150,000 and for one-half the balance to accept short-term receivers' certificates, which proposition the receivers refused (R. 63, 64) and thereafter this intervening petition was filed (R. 13).

Respondent's Point II.

It evidenced an assertion of, and an insistence upon, a claim attorneys' fees in the amount of $7,800, whereas the total amount in dispute was $3,096.22.

At no time did petitioner ask for $7,800 as attorney's fees. In its intervening petition (R. 16) it asked for reasonable attorney's fees. The undisputed evidence showed the expenditure of sixteen days' time by the attorneys (R. 25, 26). A member of the Bar called by petitioner testified that in his opinion, based on an hypothetical question

submitted to him, $7,800 would be a reasonable fee. Our argument in full with respect to the amounts involved and the value of the services is covered at pages 22 to 25 of the petition for certiorari.

Respondent's Point III.

It evidenced an assertion of, and an insistence upon, such claims to the disadvantage of other creditors, though the Chancellor found that the work of the receivers and an expenditure by them of $35,000 in merchandise advertising, contributed substantially to the liquidity of the assigned accounts, a considerable portion of which were owed by persons who had purchased the merchandise for resale at wholesale or retail with contemplation of company advertising.

No mention is made by the Court of Appeals of the expenditure by the receivers of $35,000 in advertising and the District Court merely said that

> "Receivers have expended the sum of approximately $35,000 in an advertising campaign, one of the principal purposes of which was to maintain the good will of the defendant and to preserve the receivables of the defendant as live and valuable assets. The intervening petitioner has had benefit of the services of this court of equity."

Apparently respondent now contends that because the receivers expended $35,000 for advertising, relief should be denied to this petitioner. Nowhere in his brief does the respondent claim that the expense of the advertising should be charged to petitioner. December 1, 1933, the receivers filed a petition in which they say:

> "* * *
>
> Some forty distributors assembled in Chicago November 28, 1933 and in a meeting urged upon the receivers that a conservative advertising appropriation be made for immediate newspaper advertising in the

> 52 centers of the United States involved. The reasons for this request were preservation of the good will of the business, furthering of the moving of merchandise from dealers' and distributors' stores and warehouses, and fundamentally the building up of a foundation for the new lines in January and, above all the immediate showing to the public that the Majestic radios and refrigerators are not out of business and can still be bought with assurance that the business is being maintained and will be maintained." (R. 58.)

And on the same day the trial court entered an order authorizing said receivers:

> "In the operation of the business, to expend from the assets of the receivership estate for further advertising during the month of December, 1933 the sum of $35,000.00." (R. 61.)

How was petitioner to know that the receivers intended to ask that it pay a portion of the advertising expense, when not one word is mentioned in either the petition or the order. The receivers by their answer to the intervening petition contended that such advertising expense was incurred for the purpose of realizing on assigned accounts receivable. The testimony was that the $35,000 was not paid in cash, but was in the form of credit memorandums to customers to do advertising in their local territory (R. 25). Nowhere in the record does it appear that one cent of the $35,000 was expended in connection with any account assigned to petitioner. The District Court's finding in this respect was not based on anything in this record (R. 74). What amount the receivers were asking that appellant be required to pay or contribute is not expressed in the answer or in the finding by the court. Without any testimony or evidence of any kind the trial court could not have arrived at any amount that petitioner was to pay or be charged with. How the expenditure by the receivers of $35,000 for "advertising" helped to collect the assigned accounts, no one can determine. Whether the petitioner

profited by the expenditure is highly conjectural. The record does disclose that at the time the receivers were appointed petitioner had over $550,000 in assigned accounts and trade acceptances and the balance of money then due it was less than $275,000. Before the advertising appropriation was expended the Ford Motor Company paid the receivers $100,000, which account was then owned by petitioner (R. 64). There was then on deposit in the special account of the receivers over $50,000 resulting from collections on accounts held by petitioner (R. 64). Petitioner had indefensible trade acceptances in the sum of $85,647.22 (R. 64). The last three amounts total $235,647.22. Following the receivers' contention to a logical conclusion one finds that before one cent of the advertising appropriation was spent, less than $40,000 would have paid off all claims of petitioner, and petitioner had accounts in the sum of $314,352.75, out of which it could collect such balance. To collect $40,000 the receivers contend they spent $35,000 for advertising which "redounded to the benefit of petitioner" and hence infer that petitioner should pay for such advertising. We submit that the proof in this case shows that the advertising appropriation was obviously made for the purpose of retaining the good will of the distributors and as the receivers said in their petition that one of the purposes of such expenditure was:

> "Above all the immediate showing to the public that the Majestic radios and refrigerators (product of Grigsby-Grunow Company) are not out of business and can still be bought with assurance that the business is being maintained and will be maintained." (R. 58.)

Before the receivers were appointed the accounts apparently were paying in due course, but perhaps because the receivers were appointed the distributors were worried whether the Grigsby-Grunow Company would continue in business and the receivers, in order to assure the distribu-

tors of the continuance of the business and to preserve their good will and patronage, made this expenditure. If the receivers expected contribution for such advertising, why was not that matter discussed with petitioner or its counsel? Why was not something set forth in the petition that the advertising expenditure was to liquidate the accounts that had been assigned to petitioner, and why was there no request of the court that an order be entered directing that a portion of such advertising expense should be borne by petitioner, thereby giving petitioner an opportunity to be heard, and presenting its point of view?

Taking into consideration the petition for advertising filed by the receivers and the order entered in connection therewith, it is clear that at the time that matter was presented to the District Court no thought existed in the minds of the receivers that any part of the expense of advertising was to be charged to petitioner.

In the *Matter of Lutz & Schramm Company, Inc.*, 38 A. B. R. 351, page 356, the court said:

> "The collection of the accounts by them (receivers) was for the benefit of the bankrupt estate so as not to interfere with the preservation of the good will."

The District Court did not impose any conditions on petitioner before granting it any relief. The court merely infers that because petitioner has had the benefit of the services of the court of equity, it has had ample relief. To follow the court's decision to a conclusion, one finds that the conscience of the court below was not shocked when it required the receivers to pay interest at the rate of twenty per cent, but when it found that due to the retention of the collections by the receivers the interest increased to an average of 28.3 per cent, then its conscience was so shocked that all interest in excess of seven per cent was disallowed. The point we are making is that 20 per cent was not shocking, but 28.3 per cent was, and therefore only seven per cent was allowed. Without seeming to

beg the question, we might suggest that the court, notwithstanding the experience of the receivers in this particular business, could have made an allowance of interest at the rate in effect prior to the appointment of the receivers.

Respondent quotes copiously from the opinion of the District Court and the Court of Appeals and at page 6 says: "The foregoing opinions are amply supported by authorities." Not one authority is cited and it strikes us as singular that respondent has made no attempt to distinguish the instant case from the multitude of decisions to the contrary, cited in our petition for the writ.

At page 7 of the brief, respondent contends that the case of *In re: International Raw Materials Corporation,* 22 Fed. (2) 920, and *Merchants & Manufacturers Securities Company* v. *Johnson,* 69 Fed. (2) 940, both relied on by petitioner, involved facts different than those in the instant case. In the *International Raw Material* case the facts are identical and cannot be distinguished. That case, this court will remember, is the one that criticized the case of *Chicago Reed & Furniture Company,* 7 Fed. (2) 885 (7th Circuit), the opinion on which the Court of Appeals predicated the instant decision.

In the case of *Merchants & Manufacturers Securities Company* v. *Johnson,* 69 Fed. (2) 940, six per cent interest after receivership was the only prayer of the finance company. That case involved questions of doing business in Missouri without authority as a foreign corporation and involved the construction of the State constitution which provides for the forfeiture of the lien of a pledge if interest in excess of eight per cent is exacted. Both questions in so far as they related to a finance company doing business in Missouri had never been passed upon and those being the more important questions in the case the finance company did not question the allowance of interest after the appointment of the receiver. Certiorari in that case was denied by this Honorable Court October 8, 1934.

The only other case cited by respondent is *LeSeuer* v. *Manufacturers Finance Company,* 285 Fed. 490 in which the facts were different. There, a contract was entered into between petitioner and the manufacturing company for the purchase of accounts receivable. The manufacturing company became financially involved and by action of its stockholders a committee was appointed to take charge of and liquidate its business and subsequently a *new* agreement was entered into between the committee, the manufacturing company and petitioner, by which the manufacturing company agreed to forward by mail to petitioner all original remittances and collections on accounts theretofore purchased, the contract containing the proviso,

> "With authority to the latter (finance company) to apply the same in accordance with the terms of the original contract of July 26, 1912, but without prejudice to the rights of the manufacturing company and its committee with respect to the matter of usury or any other matters under that contract and the transactions had thereunder."

For a short period thereafter, the committee remitted collections and thereafter refused so to do, contending that the contract was usurious and void, and that the finance company was doing business in Tennessee without authority. Petitioner filed its bill of complaint asking for a decree against the liquidating committee, requiring such committee to deliver up all the accounts not collected and in default, or for the amount thereof, as well as for other relief. The defense was that the contract was usurious and the proceedings thereunder void, and that petitioner was doing business in Tennessee without authority. The District Court first held that the contract was usurious under the laws of Maryland and void, and entered a decree accordingly. The court's attention was then called to a decision by the Court of Appeals of Maryland and the court then held after a reargument of the case, that the loans

were not void, but the only effect of usury was to void the excessive interest over the legal rate. The first decree was set aside and the matter referred to a master, who found that the company was entitled to recover their advances plus six per cent interest and rejected the defendant's contention that the petitioner should be charged with expenses incurred in collecting the assigned accounts. A final decree was entered in accordance with the report of the master, and affirmed by the Court of Appeals, and with respect to the cost of the collections to the liquidating committee, the court says (page 500):

"In our opinion, however, the liquidating committee should have been allowed the cost of the collections which it made, the amount of which, as shown by the uncontested evidence, is $4,446.52. True, by the agreement of 1912 between the finance company and the manufacturing company, the latter was to make collections at its sole expense and in the agreement of July 30, 1914 between the liquidating committee and the finance company the former agreed to forward remittances for the accounts collected, 'in accordance with the terms of said contract of July 26, 1912,' there being, however, otherwise no reference, direct or indirect, to the cost of collections. The manufacturing company, however, is *insolvent;* its general creditors cannot be paid in full; the decree in plaintiff's favor exhausts the entire fund in the committee's hands arising from the collection of the assigned accounts; and unless expense of the collections by the committee upon these accounts is paid out of the amounts collected, the result is that such expense must be paid by general creditors. Assuming that the committee had power to pay the expenses out of general assets, provided there remained sufficient to pay general creditors in full, not only is it open to serious doubt whether the committee had power to make such agreement as against general creditors of the insolvent estate (especially in view of the terms of the stockholders' assignment to the committee), but in our opinion to impose such liability would be inequitable as against general creditors."

Obviously, the situation in the *LeSeur* case was different than in the instant case. Here, receivers were appointed to operate the business of the solvent corporation having assets of $23,000,000 over and above all liabilities (R. 3). The receivers, after protecting themselves with a court order made a present of credits in the sum of $35,000 to their distributors to retain their good will and to continue their business relationship. In the *LeSeuer* case the company was *insolvent* and there was proof of the actual cost (to general creditors) of making the collections. Here, so far as the record discloses there were assets more than sufficient to discharge the claims of all creditors in full and the only ones affected would be the stockholders of the company.

CONCLUSION.

Since 1925 and commencing with the case of *In re: Chicago Reed & Furniture Company,* 7 Fed. (2) 885, and now followed in the instant case, a grave uncertainty has existed in the Federal Courts in Illinois with respect to corporations obligating themselves to pay interest in excess of seven per cent. The Bar have no way of knowing what rate of interest the District Court will enforce in a suit in equity. The amount involved here and the claim for attorney's fees are of minor importance. The decision of the court below is in conflict with the decisions of the Circuit Court of Appeals for the 2nd and 8th Circuits on exactly the same matters, and the court below has decided an important question of local law in conflict with the laws of Illinois, as construed by the Illinois courts. It has likewise refused to recognize that established policy which requires Federal courts sitting in Illinois to follow the decisions of the Illinois courts on questions of interest or usury.

We respectfully insist that manifest error appears in the decision below which can and should be settled by this Honorable Court's ruling, and that therefore the petition for writ of certiorari should be granted.

Respectfully submitted,

EDWARD ROTHBART,
NORMAN M. PETERSON,
JULIUS M. ROSENFIELD,
SAMUEL A. DEW,
Counsel for Petitioner.

FILE COPY

FILED
DEC 10 1934
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 522

MANUFACTURERS' FINANCE COMPANY,
Petitioner,

vs.

FRANK M. McKEY, as Trustee in Bankruptcy of the Estate of GRIGSBY-GRUNOW COMPANY,
Respondent.

BRIEF OF PETITIONER

EDWARD ROTHBART,
NORMAN M. PETERSON,
JULIUS M. ROSENFIELD,
of Chicago, Illinois,
SAMUEL A. DEW,
of Kansas City, Mo.,
Counsel for Petitioner.

SUBJECT INDEX.

PAGE

Decisions Below 1
Jurisdiction 1
Statement of the Case 2
Specification of Errors 6
Questions Presented 7
Summary of Argument 8
Argument 10
Conclusion 30

CASES CITED.

Alston v. American Mtge. Co., 116 Ohio 643 22
American Central Railroad Co. v. Miles, 52 Ill. 174 23
Anderson v. Anderson, 2 (Call.) 6 Va. 198, 205 21
Boise v. Talcott, 264 Fed. 61 ..... 19, 28
Brierly v. Commercial Credit Co., 43 Fed. (2nd) 730.... 19
Carozza v. Federal Finance & Cr. Co., 149 Md. 223 22
Chapman v. Emerson, 8 Fed. (2nd) 353 19
Chase & Baker v. National Trust & Credit Company, 215 Fed. 633 24
Colonial Trust v. Central Trust Co., 243 Pa. 268 21
Danville v. Pace, 25 Gratt. Va. 1 22
Estes v. E. B. Estes & Son, 24 Fed. (2nd) 756 ..... 19, 25, 28
Gunby v. Armstrong, 133 Fed. 417, 433 18
Hagaman v. Reinach, 96 N. Y. S. 719 17
Hartford Ins. Co. v. Hadden, 28 Ill. 260 23
Hedges v. Dixon County, 150 U. S. 182, 189 21
Home Bond v. McChesney, 239 U. S. 568 24
In re: Chicago Reed & Furniture Co., 7 Fed. (2nd) 885 ..... 6, 7, 8, 11, 12, 13
In re: Gotham Can Co., 48 Fed. (2nd) 540 ..... 19, 24, 28
In re: Rosenblatt, 299 Fed. 771 ..... 19, 28
International Raw Material Co., 22 Fed. (2nd) 920 ..... 12, 13, 19, 25, 28, 29
Lembeck v. Jarvis Terminal Cold Storage Co., 64 Atl. 126 22
LeSueur v. Manufacturers Finance Co., 285 Fed. 490 ..... 19, 24

PAGE

Lloyd v. Scott, 7 Law Ed. 833 (4 Peters, 205, 222) 17
MacQuoid v. Queens Estates, 143 App. Div. (N. Y. S. 134, 136) 22
Magniac v. Thompson, 15 (How.) U. S. 281 21
Mason, et al. v. United States, 260 U. S. 545, 557 16
Matter of Lutz & Schramm Co., Inc., 38 A. B. R. 351, 356 .... 19, 28, 29
Miller v. Reid, 243 Mich. 694 22
Merchants & Manufacturers Securities Co. v. Johnson, 69 Fed. (2nd) 940 .... 12, 19, 25, 29
Michigan v. Michigan Trust Co., Receiver, 286 U. S. 334, 342 15
M. K. & T. Trust Co. v. Krumseig, 172 U. S. 351, 355, 359 .... 15, 20
National Discount Co. v. Evans, 272 Fed. 570 24
Ovsiovitch v. Federal Tool & Mfg. Co., 94 N. J. Eq. 744 22
Pacific State Sav., Loan & Bldg. Co. v. Green, et al., 123 Fed. 43, 46 .... 18, 19
People v. Wheeler, 259 Ill. 99 19
Poe v. Ulrey, 233 Ill. 56, 63 18
Polish Peoples Home Ass'n & Printpress Co. v. Atlas, et al., 246 Ill. App. 457 12
Ramsey v. Marlin Firearms Co., 14 Fed. (2nd) 314 .... 19, 25
Simon v. South End Cleaners & Dyers, Inc., 246 Ill. App. 14 11
Tennant v. Joerns, 329 Ill. 34 .... 11, 14
Thomas v. Union Trust Co., 251 Mich. 279 .... 22, 23
United Divers v. Commercial Credit Co., 289 Fed. 316 19

STATUTES CITED.

Cahill's Illinois Revised Statute, 1933 Ed. Ch. 32, Sec. 5 (h) P. 725 11
Cahill's Illinois Revised Statute, 1933 Ed. Ch. 74, Sec. 4, P. 1701 11

TEXTBOOKS CITED.

39 Cyc. 891 17
66 C. J. 143 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 522

MANUFACTURERS' FINANCE COMPANY,
Petitioner,

vs.

FRANK M. McKEY, as Trustee in Bankruptcy of the Estate of GRIGSBY-GRUNOW COMPANY,
Respondent.

BRIEF OF PETITIONER

Decisions Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 72 Fed. (2) 471 (R. 93).

The memoranda opinion of the District Court has not been officially reported, but is printed in full in the record (R. 70).

Jurisdiction.

Certiorari was granted by this Honorable Court December 3, 1934.

STATEMENT OF THE CASE.

A bill of complaint in equity was filed in the United States District Court for the Northern District of Illinois, Eastern Division, on November 23, 1933, by one creditor with a claim sufficient to confer jurisdiction, against the Grigsby-Grunow Company (hereinafter termed company) an Illinois corporation (R. 2). The following day the company answered, admitting the averments of the bill and joining in the prayer thereof (R. 6) whereupon the District Court appointed the vice president of the company (R. 52) and counsel for respondent, as temporary receivers (R. 7) for all the property and assets of the company alleged to be worth $13,000,000 in excess of liabilities (R. 3, 65) with the usual powers of operating receivers (R. 7, 9) and they qualified the same day (R. 9). On December 5, 1933, by special order the receivers were continued as such and granted unrestricted powers to operate the business and properties of the company as a going concern (R. 19).

November 29, 1933, petitioner filed its intervening petition in the main proceeding (R. 13) alleging that it had fully performed a contract that it had entered into with the company, bearing date October 5, 1933 (R. 46), providing for the purchase from the company of such accounts receivable as might be acceptable to it and for the performance of certain services for which the company agreed to pay fixed compensation.* The making, execution and de-

*The contract provided for the sale of accounts receivable to petitioner by the company, for which petitioner agreed to pay the company 100 per cent of the actual net amounts thereof, of which 50 per cent was to be paid upon acceptance of such accounts by petitioner and the remaining 50 per cent, less any deductions and plus any overpayments by debtors, and less the compensation, was to be paid to the company immediately upon payment of the accounts to petitioner, with the proviso that such remainder need not be paid by petitioner so long as any account pur-

ivery of the contract by the company was approved by its Board of Directors (R. 65, 66).

Under said contract petitioner claimed to have purchased accounts receivable aggregating approximately one and one-half million dollars (R. 33, 34) and to have paid about $750,000 thereon (R. 33) and that when the receivers were appointed petitioner held accounts amounting to approximately $550,000 and had paid the company therefor about $265,000 (R. 13); petitioner further prayed that the court direct its receivers to deliver to petitioner all moneys collected by them on accounts theretofore assigned to petitioner until such time as it shall have received the amount due it, together with reasonable attorney's fees, costs and expenses (R. 16).

This intervening petition was necessitated by the refusal of the receivers to pay over any moneys collected on accounts purchased by petitioner until directed to do so by

---

chased by petitioner from the company shall be in any manner affected by any breach or violation of any warranty of the company (R. 47). The company warranted there would be no appointment of receivers for the company (R. 48, 49).

The company was given the right to collect such accounts; such right to terminate in the event, among others, of a business failure of the company. Proceeds of collections were to be transmitted to petitioner in kind, each day as received (R. 47). If incurred, the company was to pay petitioner's attorney's fees, costs and expenses (R. 49). The rate of compensation was 83½ per cent of 1/30 of 1 per cent of the net face amount of accounts for each day from the date of purchase by, until paid to, petitioner (R. 48, 62). This compensation was at the rate of 20 per cent per annum (R. 63).

The services to be performed by petitioner consisted of: (1) to furnish by mail to the company credit information in hand about the customers of the company, upon request of the company (R. 47). (2) Have auditors give to the company the report of such examination therein provided for, with full information and advice as to the most desirable method of keeping the books, records and accounts of the company. (3) Pay for all accounting, postage and credit investigations of accounts purchased or offered for purchase, and upon request give financial and business advice. (4) Accept at par, less exchange, subject to payment, all remittances received through the company. (5) Obtain and have on hand at all times, sufficient funds to make prompt remittance to the company for all acceptable accounts within the limits agreed upon. (6) Supply all forms needed for assignment of accounts. (7) Place petitioner's credit and collection department at the disposal of the company and permit the company to submit any of its sales contracts with its customers to the general counsel of petitioner for advice and opinion as to form and legality thereof (R. 48).

the court (R. 43, Par. 13) and by the entry of an order on the petition of the receivers, *without notice to petitioner* to turn over and deliver to petitioner *on the same basis as prior to the filing of the bill of complaint* funds collected by the receivers on such assigned accounts (R. 63) and after all efforts to amicably adjust the controversy had failed (R. 63, 64). The receivers filed their answer (R. 17) virtually admitting the allegations of the petition and by way of a defense stated that they had expended time and money in dealing with debtors which "redounded to the benefit of petitioner"; that the contract involved merely a loan of money to the company and that they can see no justification for equitable charge against them upon balances owing as of the date of receivership of an interest rate thereupon in excess of the legal maximum rate permitted by the laws of the State of Illinois; that in the practice between the company and petitioner prior to receivership one-half of accounts collected was paid to petitioner, the accounts remaining substantially twice in face amount of net remaining advances.* That all collections upon such accounts made since the appointment of the receivers were placed in a special bank account (R. 19), the answer not denying full performance by petitioner and not denying various breaches of the contract by the company (R. 17). On the trial the receivers filed an amendment to the answer, alleging that the principal amount of the advances and interest at the contract rate to the date of the appointment of the receivers was paid to petitioner and the words "legal maximum rate" were changed to "7 per cent per annum" and denied that in equity petitioner is entitled to recover attorney's fees (R. 21).

---

*This was erroneous. The stipulated facts are that when the company received payment from its customers it transmitted each payment in its original form to petitioner. Petitioner would endorse and deposit the remittance thus received and remit to the company the balance of the face value of the accounts not already advanced, that is, 50 per cent less any deductions and plus any overpayments by the respective debtors (R. 43, Par. 10).

Petitioner moved to strike the answer and the amendment to the answer pursuant to Equity Rule 33 on the ground that said answers were clearly insufficient in point of law (R. 22), which motion was denied (R. 23).

On three occasions during the period from December 14th to December 29, 1933, on orders entered by the court (R. 64, 65) the receivers paid petitioner $186,162.48 (R. 44, 45, Par. 16, 17, 19) collected on accounts assigned to petitioner and petitioner collected $83,538.30 on trade acceptances purchased from the company (R. 45, Par. 18) which paid all cash advances by petitioner to the company, together with compensation or interest at the contract rate to the date the receivers were appointed (R. 45, Par. 20).

The suit proceeded for compensation at the contract rate from November 24th to December 29, 1933, amounting to $4,394.48 (R. 45) the rate of return to petitioner being variable under the terms of the contract for the reason that the compensation was calculated upon the net face amount of accounts rather than on the money advanced (R. 65, Par. h). Petitioner also claimed that it was entitled to reasonable attorney's fees and costs (R. 16).

Prior to receivership, while adjustments were being made of accounts and cash so that a 50 per cent reserve was being maintained, the gross return to petitioner was 20 per cent per annum on the cash it advanced (R. 43). Subsequently, for a short period the return rose sharply, due to the retention of collections by the receivers and to the method of calculation. There is no proof in the record, pleadings, stipulations of fact, testimony or evidence indicating or inferring that the rate of return to petitioner at any time for any period amounted to 250 per cent per annum as found by the trial court in its findings of fact and conclusions of law (R. 74) and accepted as proven by the Court of Appeals (R. 95). Petitioner excepted to the findings of fact and conclusions of law made by the

trial court (R. 75). However, by the amended stipulation of facts it was agreed that the compensation claimed subsequent to receivership constitutes an average claim of 28.3 per cent upon the average net balance of cash outstanding (R. 65).

The suit was heard on the pleadings and a stipulation of facts (R. 30) and an amended stipulation of facts (R. 62) together with a small amount of testimony introduced by each side (R. 23 to 29, inc.). The District Court allowed petitioner interest from the date the receivers were appointed at the rate of 7 per cent per annum and denied further relief (R. 76) on the ground that paying 28.3 per cent interest per annum is unconscionable, adhering strictly to the decision of the Circuit Court of Appeals for the 7th Circuit in *In re: Chicago Reed & Furniture Company,* 7 Fed. (2) 885.

The Court of Appeals affirmed the decree (R. 98) likewise adhering to the *Reed* case (R. 97).

After the appeal was perfected and briefs filed and on the day the matter was set for oral argument, an order was entered by the Court of Appeals, substituting Frank M. McKey as trustee in bankruptcy of the company, in lieu of said equity receivers (R. 92).

Specifications of Error.

The Courts below erred:

1. The District Court erred in failing to allow petitioner's motion to strike the answer and amendment to the answer from the files.

2. The District Court erred in refusing to grant the prayer of the intervening petition.

3. In not holding that Federal courts are obliged to follow State laws permitting corporations to pay any rate of interest.

4. The Circuit Court of Appeals erred in affirming the decree of the District Court.

5. The Courts below erred in not overruling *In re: Chicago Reed & Furniture Company,* 7 Fed. (2) 885 (7th Circuit).

QUESTIONS PRESENTED.

I.

Where a state, by statute, authorizes corporations to pay any rate of interest that such corporation may determine, does a Federal court located within that state have to enforce a contract of such corporation to pay 28.3 per cent interest, or is such contract, prima facie, without claim or proof of fraud, accident or mistake, so manifestly harsh and oppressive that the court may refuse relief solely on that ground?

II.

Are receivers appointed by a Federal equity court bound by the terms of a contract under which the corporation that they are appointed for agrees to pay interest at the rate of 28.3 per cent as well as reasonable attorney's fees and costs?

III.

Should the District Court sustain a motion to strike answers when such answers are clearly unfounded in law?

IV.

Are the statutes of a state permitting corporations to pay ANY rate of interest binding on Federal equity courts sitting within that state?

SUMMARY OF ARGUMENT.

The statutes of Illinois permit corporations to pay any rate of interest that they may agree upon and these statutes have been upheld by the Supreme Court of Illinois. (pp. 10, 11.)

The 7th Circuit held in *In re: Chicago Reed & Furniture Company,* 7 Fed. (2d) 885 (1925) and again in the instant decision that Federal courts in equity proceedings are not obliged to enforce the agreement of a corporation to pay 28.3 per cent as interest, on the sole ground that such rate is manifestly harsh and shocking to the conscience, which holding is contrary to the weight of authority. (p. 11.)

The policy of a state is determined by its legislative enactments and the decisions of the court of last resort, which enactments and determinations are binding and conclusive on Federal courts sitting within that state. (p. 14.)

Contracts, fairly entered into between competent parties, without any question or evidence of fraud in the case are binding and enforceable in the courts, and corporations who are precluded by state law from defending on the ground of usury, cannot do so merely because the matter is pending in the Federal courts. (pp. 17, 18, 19.)

Petitioner in this case was not asking for equitable relief. It was merely seeking to avail itself of a substantive right under the statutory law of the state. (p. 20.)

In the absence of fraud, accident or mistake, a court of equity should not change the terms of a contract. (p. 21.)

Legislative enactments permitting corporations to pay any rate of interest they may agree upon have been upheld by reviewing courts in many states. (pp. 22, 23.)

Receivers appointed by a court of equity to operate the business of a corporation are bound by the terms of a contract under which the corporation agrees to pay interest, costs and attorney's fees. (pp. 23, 24, 25.)

Petitioner was entitled to recover its costs and attorney's fees under the terms of the contract. (pp. 26, 27, 28, 29.)

ARGUMENT.

I.

The policy of the Illinois law as reflected by its statutes and the decisions of its reviewing Courts is to permit corporations to pay any rate of interest.

(A) The statutes as construed by the Supreme Court of Illinois are binding on Federal equity courts sitting within that state.

As appears from the statement of facts, the vital questions presented to the District Court and to the Circuit Court of Appeals was whether an Illinois corporation may stipulate or agree upon any rate of compensation or interest and take and pay the same, and whether such contract is binding upon receivers for the corporation appointed by a Federal equity court.

Petitioner filed an intervening petition setting forth the contract, the obligations of the company thereunder, various breaches thereof by the company, and concluded with a prayer for an order directing the receivers to deliver all moneys collected by them on accounts sold to petitioner until such time as the petitioner shall have received the amount due it, together with its reasonable attorney's fees, costs and expenses (R. 16). The answer and the amendment to the answer filed by the receivers set forth no legal defense to the petition and the motion to strike the same should not have been denied (R. 17, 21, 22).

By the statutes of Illinois in effect during the time of all the transactions here involved it was provided that a corporation may "borrow money for its corporate purposes

at such rates of interest as the corporation may determine without regard to the restrictions of any usury law of this state." (Cahill's Illinois Revised Statutes, 1933 Ed. Ch. 32, Sec. 5(h) page 725.) This statute is almost identical with the enactment of 1919. From 1919 to 1925 there were no decisions either in the State courts or in the Federal courts located in Illinois construing the above statute. In 1925 the Circuit Court of Appeals for the 7th Circuit decided *In re: Chicago Reed & Furniture Company,* 7 Fed. (2nd) 885. That case involved a loan of $1,700 on chattel mortgage security. Notes aggregating $2,000 payable in twelve monthly installments and bearing interest at 7 per cent were given. The borrower was adjudicated bankrupt and on a petition filed by the holder of the security, relief was granted, except as to the item of $300 claimed to be a commission, the court holding that notwithstanding the Illinois statutes permitting corporations to pay any rate of interest, such statute did not abrogate the rule that courts of equity will not lend their aid to enforce contracts which upon their face are so manifestly harsh and oppressive as to shock the conscience.

Since July 1, 1925, the Interest Acts of Illinois have provided:

> "With respect to money loaned to or in any manner due and owing from a corporation, the parties may stipulate or agree upon any rate of interest whatsoever, and take and pay the same." (Cahill's Illinois Rev. Statutes, 1933 Ed. Ch. 74, Sec. 4, page 1701.)

On February 24, 1928, in *Tennant* v. *Joerns,* 329 Ill. 34, the Supreme Court sustained the constitutionality of the 1919 Act permitting corporations to borrow money at such rates of interest as they may determine and in effect held that said statute withdrew from the operation of the Interest Act loans to corporations which would otherwise be unlawful. Subsequently, the Appellate Court of Illinois in *Simon* v. *South End Cleaners & Dyers, Inc.,* 246 Ill.

App. 14 and *Polish Peoples Home Association and Printpress Company* v. *Atlas, et al.,* 246 Ill. App. 457, the latter an equity case, held that by reason of the statute, corporations could not defend on the ground of usury.

On March 5, 1934, the Circuit Court of Appeals for the 8th Circuit rendered its decision in *Merchants & Manufacturers Securities Co.* v. *Johnson,* 69 Fed. (2d) 940.* In that case identical contracts were before the court. A high rate of interest was involved. The defenses urged by the receiver were usury and that the contracts were harsh, inequitable and unconscionable. The finance company contended that the contracts were to be construed according to the laws of Illinois where usury was no defense. The receiver argued to the contrary and relied on the *Chicago Reed & Furniture* case, 7 Fed. (2) 885 as the authority in the 7th Circuit. Ignoring that decision the court held that the contracts construed by the laws of Illinois were not usurious and that the receiver succeeded to the property, subject to the same contract rights as obtained at the time of his appointment, and reversed the District Court.

In 1927 the Circuit Court of Appeals for the 2nd Circuit decided the case of *In re: International Raw Material Corporation,* 22 Fed. (2) 920. In that case there was a pledge of accounts by the bankrupt. The finance company sold the collateral and there remained a surplus of $3,351.42, out of which amount the finance company retained interest of $1,251.75, calculated at the rate of 1½ per cent per month, and $500.00 in attorney's fees. The referee followed the holding in *In re: Chicago Reed & Furniture Company,* 7 Fed. (2) 885 and directed the finance company to pay over to the trustee the amount it withheld for interest and attorney's fees, which decision was affirmed by the District Court. On appeal, that

*Certiorari denied October 8, 1934.

decision was reversed and the Court of Appeals held that there was no justification for nullifying the agreement of the parties because the interest and commissions which they deliberately arranged were too large to satisfy the ideas of the court, and that the statute has not attempted to control usurious contracts of corporations. The *Chicago Reed & Furniture Company* case is mentioned by name and severely criticised.

The Court of Appeals in this case recognize the force and logic of the argument advanced by the 2nd Circuit in the *International Raw Material Corporation* case, 22 Fed. (2) 920, but refuse to follow it. The court concedes that the International case is similar, differing only in the amount of attorney's fees claimed and in the fact that petitioner was *attempting* to charge the receivers a rate of interest considerably higher than the rate in fact used between the contracting parties, and conclude their opinion with this statement:

> "We can see no reason under the circumstances of this case for overruling the principle laid down in the Chicago Reed & Furniture case, *supra*, in favor of that enunciated in International Raw Material Corporation, *supra*." (R. 97.) (Opinion p. 473.)

The Court of Appeals in its opinion in the instant case relies on its former decision in the *Chicago Reed & Furniture Company* case, 7 Fed. (2d) 885, as the sole authority for the proposition that equity will not enforce a contract which is unconscionable, only because the interest provided for is higher than the court thinks proper, and on that point the Court of Appeals admits that the weight of authority is with the petitioner when it says that petitioner finds substantial support for its contention to the contrary in cases cited by it, the strongest of which for its purposes is *International Raw Material Corporation*, 22 Fed. (2) 920.

The policy of the Illinois law was established by the legislature when it adopted statutes permitting corporations to pay any rate of interest and such policy is clearly expressed in *Tennant* v. *Joerns,* 329 Ill. 34, wherein it was urged that the act authorizing corporations to pay any rate of interest is immoral in principle and contrary to public policy. With respect to that phase of the matter the court said, page 40:

> "What constitutes usury is determined by the legislature and varies in different States. It has varied at different times in this State. This court held in *People* v. *Wheeler,* 259 Ill. 99, that usury of itself is not immoral. 'It would be contrary to common experience to say that a man who lends money at usurious rates is for that reason, alone, not a man of good moral character.' Usury is not a crime in itself, and its defense to a suit depends upon the expressed statutes. It is not founded on a common law right and is clearly within the power of the legislature to take it away. (*Rosa* v. *Butterfield,* 33 N. Y. 665; *Southern Life Ins. and Trust Co.* v. *Packer & Prentice,* 17 *id.* 51; *Town of Danville* v. *Pace,* 25 Gratt. i, 18 Am. Rep. 663.)"

It is respectfully submitted that under the Illinois law, corporations may engage themselves to pay any rate of interest and such obligation is binding and enforceable in the courts.

(A) The statutes as construed by the Supreme Court of Illinois are binding on Federal equity courts sitting within that state.

This court has repeatedly held that the statutes of a state are binding upon Federal courts sitting within the state, provided such statutes do not enlarge or diminish Federal equity jurisdiction.

In *M. K. & T. Trust Company* v. *Krumseig,* 172 U. S. 351, this court considered the question of whether the statutes of a state defining the rights of the parties under a contract for a high rate of interest was binding on Federal equity courts. The holding is that all questions of the rights of the parties under such contracts depend upon the laws of the state where the transaction took place and that Federal courts are bound by statutes and decisions of the courts of such state on that subject, even though such statutes and decisions appear contrary to fundamental principles of equity, and said, at page 355:

> "Usury is, of course, merely a statutory offence, and Federal courts in dealing with such a question must look to the laws of the State where the transaction took place, and follow the construction put upon such laws by the state courts. *DeWolf* v. *Johnson,* 10 Wheat. 367; *Scudder* v. *Union National Bank,* 91 U. S. 406."

And again, page 359, says:

> "If the states, whether New York, Arkansas, Minnesota or others, think that the evils of usury are best prevented by making usurious contracts void, and by giving a right to the borrowers to have such contracts unconditionally nullified and cancelled by the courts, such a view of public policy, in respect to contracts made within the State and sought to be enforced therein, is obligatory on the Federal courts, whether acting in equity or at law. The local law, consisting of the applicable statutes as construed by the Supreme Court of the State, furnishes the rule of decision."

In *Michigan* v. *Michigan Trust Co., Receiver,* 286 U. S. 334, in an equity proceeding, this court said, page 342:

> "Our task is to ascertain the meaning of a Michigan statute, and as to that the courts of the State, if they have spoken, pronounce the final word."

In *Mason, et al.* v. *United States,* 260 U. S. 545, this court said, page 557, *et seq.*:

> "Subject to certain exceptions, the statutes of a State are binding upon the federal courts sitting within the State, as they are upon the state courts. One of the exceptions is that these statutes may not be permitted to enlarge or diminish the federal equity jurisdiction. *Mississippi Mills* v. *Cohen,* 150 U. S. 202. That jurisdiction is conferred by the Constitution and the laws of the United States and must be the same in all the States. *Neves* v. *Scott,* 13 How. 268. But while the power of the courts of the United States to entertain suits in equity and to decide them cannot be abridged by state legislation, the rights involved therein may be the proper subject of such legislation. See *Missouri, Kansas & Texas Trust Co.* v. *Krumseig,* 172 U. S. 351, 358. In *Brine* v. *Insurance Co.,* 96 U. S. 627, 639, this Court said: 'We are not insensible to the fact that the industry of counsel has been rewarded by finding cases even in this court in which the proposition that the rules of practice of the Federal courts in suits in equity cannot be controlled by the laws of the States, is expressed in terms so emphatic and so general as to seem to justify the inference here urged upon us. But we do not find that it has been decided in any case that this principle has been carried so far as to deny to a party in those courts substantial rights conferred by the statute of a State, or to add to or take away from a contract that which is made a part of it by the law of the State, except where the law impairs the obligation of a contract previously made."

It follows that the District Court and the court below are bound by the Illinois statutes and the decisions of the local courts, which they refused to follow.

II.

The finding by the Court below that courts of equity need not enforce contracts of corporations to pay a large amount of compensation or interest on the ground that such rate is shocking to the conscience of the Chancellor, is contrary to the weight of authority, and overlooks the maxim that equity follows the law.

The opinion of the court below assumes that there is some equitable or moral standard by which rates of compensation or interest may be measured in a Federal court of equity, without reference to the statutes of the individual state, and that a court of equity may properly decline to enforce a contract, free from fraud, for an agreed rate, merely because such rate is too high in the opinion of the court, and disregard the statutes of the State where the transaction took place, which expressly permits *any* rate upon which the parties may agree.

In the *Reed* case, the court cites 39 Cyc. 891 as authority for its conclusion that equity will not enforce a contract where the rate of interest to be paid by a corporation which cannot legally defend on the ground of usury is so harsh and oppressive as to shock the conscience. That section is now found in 66 C. J. 143 under the title *"Oppressive Contracts as Distinguished From Usurious Contracts."* There are several cases cited under this heading, but none of them grant relief to a corporation. One of the cases cited, *Hagaman* v. *Reinach,* 96 N. Y. S. 719 (1905) quotes the opinion of this court in *Lloyd* v. *Scott,* 7 L. Ed. 833 (4 Peters, 205, at page 222):

> "The act of usury has long since lost that deep moral stain which was formerly attached to it; and is now generally considered only as an illegal or immoral act because it is prohibited by law."

To sustain the view of the court below, it necessarily had to ignore the contract, freely and voluntarily entered into between the parties. There is nothing in the Illinois law fixing 7 per cent interest as either a minimum or a maximum rate to be paid by a corporation, and that, we submit, is a material change of the terms of the contract not contemplated by either of the parties.

In *Pacific State Savings, Loan & Bldg. Co.* v. *Green, et al.,* 123 Fed. 43 (9th Cir.), the court says, page 46:

> "The general rule is, we think, well settled that a court of equity is not authorized to set aside and annul a contract made by parties with full knowledge of all the terms and conditions of the same, without it is clearly and satisfactorily shown that there was fraud, oppression, or undue advantage taken with reference to its execution." (Citing cases.)

To the same effect see *Gunby* v. *Armstrong,* 133 Fed. 417 (5th Cir.), and cases cited therein at page 433.

In *Poe* v. *Ulrey,* 233 Ill. 56, at page 63, the Supreme Court say:

> "So far as the charge that the contract was harsh and unjust is concerned, it may be said that the parties were competent to contract with each other, and neither side can be relieved from their agreements on the ground that they did not use good business judgment in entering into the contract. There is no question of fraud and no charge or evidence of fraud in the case, and where parties who are competent in law and in fact to enter into contracts, freely and voluntarily contract with each other, it is of the utmost importance to them, and the public as well, that their agreement shall be respected and enforced by the courts, and that neither shall be relieved from the obligation of his contract except upon some certain ground deemed valid by the law."

Contracts identical with the one in evidence where compensation is calculated by the same method have been con-

strued by Federal trial and Appellate Courts and in each instance where the defendant corporation was precluded from interposing the defense of usury these contracts were enforced in equity and bankruptcy proceedings, not only against the corporation, but against receivers as well.*

The question of whether or not this contract was unconscionable is inseparably connected with the substantive law and public policy of the State of Illinois. Usury has never been considered *malum in se,* but *malum prohibitum.*

In *People* v. *Wheeler,* 259 Ill. 99, the Chicago Bar Association sought to disbar a practicing attorney on the ground that he was lending money at rates of interest varying from 2½ to 10 per cent a month. The Association urged his disbarment on the theory that exacting usury was immoral and hence the respondent was not a person of good moral character, which is one of the requirements for admission to the Bar. In dismissing the information the Supreme Court said:

> "Usury is not an offense against the law in Illinois. Of itself it is not immoral. It would be contrary to common experience to say that a man who lends money at usurious rates is for that reason, alone, not a man of good moral character."

Nowhere in the record or pleadings is it claimed that petitioner came into court with unclean hands, as found by the learned trial court in its memoranda opinion (R. 70). No charge is made by the receivers of any fraud, deceit,

---

* Estes v. E. B. Estes & Son, 24 Fed. (2nd) 756 (Mass. Dist. Ct.); International Raw Material Co., 22 Fed. (2nd) 920 (2nd Cir.); Ramsey v. Marlin Firearms Co., 14 Fed. (2nd) 314 (Conn. Dist. Ct.); In re: Rosenblatt, 299 Fed. 771 (Dist. Ct. of New York); Boise v. Talcott, 264 Fed. 61 (C. C. A. 2nd); In re: Gotham Can Co., 48 Fed. (2nd) 540 (C. C. A. 2nd); In the matter of Lutz & Schramm Co., Inc., 38 A.B. R. 351 (Dist. Ct. Pa.); Brierly v. Commercial Credit Co., 43 Fed. (2nd) 730 (C. C. A. 3rd); Chapman v. Emerson, 8 Fed. (2nd) 353 (C. C. A. 4th); United Divers v. Commercial Credit Co., 289 Fed. 316 (C. C. A. 5th); LeSueur v. Manufacturers Finance Co., 285 Fed. 490 (C. C. A. 6th); Merchants & Manufacturers Securities Co. v. Johnson, 69 Fed. (2nd) 940 (C. C. A. 8th); Pacific State Savings Loan & Bldg. Co. v. Green, 123 Fed. 43 (C. C. A. 9th).

dishonesty, mistake or any act on the part of petitioner justifying that conclusion.

It is true that the parties to this suit are in a court of equity, but petitioner was not asking for equitable relief—it was merely asserting its legal rights. It was not in a court of equity by choice but was forced into said proceedings by reason of the appointment of receivers who were collecting and retaining petitioner's money and by reason of the injunction entered by the trial court restraining all persons from interfering with the receivers and the estate (R. 9).

Exactly the same situation obtained in *M. K. & T. Trust Company* v. *Krumseig*, 172 U. S. 351, wherein this court held, at page 358:

> "But it is strenuously argued, and of that opinion was Circuit Judge Sanborn in the present case, that Federal courts, in the exercise of their equity jurisdiction, do not receive any modification from the legislation of the States or the practice of their courts having similar powers, and that consequently no act of the legislature of Minnesota could deprive the Federal courts sitting in equity of the power or relieve them of the duty to enforce and apply the established principle of equity jurisprudence to this case that he who seeks equity must do equity, and to require the appellees to pay to the appellant what they justly owe for principal and lawful interest as a condition of granting the relief they ask.
>
> "We think it a satisfactory reply to such a proposition that the complainants in the present case were not seeking equity, but to avail themselves of a substantive right under the statutory law of the State."

It is inconceivable that a litigant should be deprived of substantive legal rights simply because the enforcement of such rights rests with a court of equity rather than a court of law.

In *Magniac* v. *Thompson,* 15 (How.) U. S. 281, the court held:

> "Wherever the rights or the situation of the parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances, the maxim 'equity follows the law' is strictly applicable."

In *Anderson* v. *Anderson,* 2 Call (6 Va.) 198, it is said (p. 205):

> "A court of equity must consult the intention of the legislature as well as courts of law; and when the legislature have determined a matter with its circumstances, a court of equity cannot intermeddle or relieve against the express provisions of the statute."

In *Hedges* v. *Dixon County,* 150 U. S. 182, this Court said (p. 189):

> "It is too well settled to need a citation of authorities that a court of equity in the absence of fraud, accident or mistake, cannot change the terms of a contract."

In *Colonial Trust Co.* v. *Central Trust Co.,* 243 Pa. 268, it is said:

> "Legal rights are as safe in chancery as they are in a court of law and however strong an appeal may be to the conscience of a chancellor for equitable relief, he is powerless to grant it if the one from whom it must come will be deprived of a legal right."

The legislature of Illinois, which unquestionably possesses the power, has given a substantive right to corporations to pay and receive any rate of interest they see fit, and it is respectfully submitted that courts should not destroy this valuable right merely because a particular contract may, in the judgment of the court, on the surface, seem to be improvident.

Many states have adopted statutes permitting corporations to pay any rate of interest or forbidding them to interpose usury as a defense, and reviewing courts have invariably upheld and enforced these statutes in equity cases as well as in suits at law.

In **New York** the statute has been in effect since 1850 and it was there held that the effect of the statute was to repeal all existing statutes as to usury. (*MacQuoid* v. *Queens Estates,* 143 App. Div. (N. Y. S.) 134, 136.)

A similar statute in **New Jersey** was upheld in an equity proceeding. (*Ovsiovitch* v. *Federal Tool & Mfg. Co.,* 94 New Jersey Eq., 744, and in *Lembeck* v. *Jarvis Terminal Cold Storage Co.,* 64 Atl. 126.)

In **Ohio,** by statute, corporations are likewise prevented from claiming usury. (Sec. 8705 of General Code; 109 Ohio Laws, 231) and in *Alston* v. *American Mortgage Co.,* 116 Ohio 643, the Supreme Court holds that by virtue of the statute, corporations may contract for any rate of interest without limit.

By statute in **Michigan,** corporations are precluded from interposing the defense of usury to any cause of action. (Act 335, Public Acts 1927, Pt. 2, Ch. 1, Sec. 1) and in *Miller* v. *Reid,* 243 Mich. 694, in an equity action sustained the statute, and again in *Thomas* v. *Union Trust Co.,* 251 Mich. 279.

The **Virginia** law is the same and the ruling of the highest court in that state is found in *Danville* v. *Pace,* 25 Gratt. Va. 1.

In **Maryland,** the statute is approved in *Carozza* v. *Federal Finance & Cr. Co.,* 149 Md. 223. There the court differentiates between the borrowing by an individual for personal necessities, and holds that the legislature alone can determine the public policy of the state, and when it does so, through its enactments, the courts must follow

that conclusion. The *Carozza* case was quoted and approved by the Supreme Court of Michigan in *Thomas* v. *Union Trust Co.*, 251 Mich. 279.

In Illinois a statute was adopted in 1852 which declared that no corporation shall interpose the defense of usury in any action and that statute was enforced in *Hartford Ins. Co.* v. *Hadden,* 28 Ill. 260, and again in *American Central Railroad Company* v. *Miles,* 52 Ill. 174. From time to time thereafter changes were made and finally in 1919 the Corporation Act was amended permitting corporations to borrow money at such rates of interest as they may determine, and in 1925 the Interest Act was amended, permitting corporations to stipulate or agree upon any rate of interest whatsoever.

The theory expounded by the Court of Appeals in holding that merely because this contract provided for a high rate of interest makes it unconscionable, we submit, is without foundation in law or in logic. The court in its opinion points out that if this matter arose in an action at law between the original parties, it may well be that the court could not refuse to enforce the contract according to its terms (R. 97). We contend that merely because petitioner is in a court of equity, not through its own choosing, and not seeking equitable relief, and only asserting its legal rights, does not change the complexion of the law.

II-A.

These receivers appointed to continue the business of the company are bound by the terms of the contract to pay compensation and attorney's fees.

From the inception of this transaction the company was an Illinois corporation with assets of over $13,000,000 in excess of all liabilities (R. 3, 65). Acting through its

Board of Directors, and by proper resolution (R. 66) it entered into the contract in evidence under which it employed petitioner to perform various and sundry services for it. One of the major things apparently was to advance large sums of money from time to time. To secure the payment for such services and the compensation that was to be earned by petitioner, the company assigned certain of its accounts receivable and trade acceptances. Rather than to stipulate for definite compensation for these services and the advances, the parties agreed that compensation was to be determined by the amount of accounts assigned, the contract in this respect providing that for all services rendered and other considerations set forth in the contract, the company was to pay petitioner an amount equal to 83½ per cent of 1/30 of 1 per cent of the net face amount of accounts, for each day from the date of purchase by, until paid to, petitioner. Whether all that the parties actually contemplated by this contract was merely to advance the money does not appear from the pleadings, nor from the evidence. In the cases cited by the Court of Appeals in its decision the contracts did not specify that any services were to be rendered and there was proof of a contrary intention. Furthermore, those cases are inapplicable because at the time they were decided the laws of the state where the contract was made did not preclude corporations from interposing the defense of usury.* The intervening petitioner alleged that it had fully performed everything that was required to be performed by it under the terms of the contract (R. 13) and in neither the answer nor the amendment to the answer do the receivers challenge this fact (R. 17, 21). The

* Home Bond Company v. McChesney, 239 U. S. 568; National Discount Company v. Evans, 272 Fed. 570; LeSueur v. Manufacturers Finance Company, 285 Fed. 490; Chase and Baker Company v. National Trust and Credit Company, 215 Fed. 633; In re: Gotham Can Company, 48 F. (2d) 540. (The citation in re: Grand Union Company, 210 Fed. 353, is erroneous).

appointment of receivers in equity to operate a business cannot, and does not, change executed contract in any respect. Executed contracts by corporations who are precluded by statute from interposing the defense of usury are as binding upon the receivers as they are upon the companies themselves.

In *Estes* v. *E. B. Estes & Sons,* 24 Fed. (2) 756, a similar contract was under consideration and the court held that the receiver is bound even though the contract should be deemed to be of little or no advantage to the company.

In *Ramsey* v. *Marlin Firearms Corporation,* 14 Fed. (2d) 314, the court held that the appointment of the receivers did not divest the finance company of its title to the accounts and the collections by the receivers were for the benefit of the finance company.

In *International Raw Material Corporation,* 22 Fed. (2d) 920, at page 923, it was said:

> "Neither the corporations, nor those who may succeed to their rights, nor their sureties, are heard to object to their bargain, either at law or in equity, because of usury. *Curtis* v. *Leavitt,* 15 N. Y. 9; *Stewart* v. *Bramhall,* 74 N. Y. 85; *Gamble* v. *Queens County Water Co.,* 123 N. Y. 108, 25 N. E. 201, 9 L. R. A. 527; *Hubbard* v. *Tod,* 171 U. S. 474, 19 S. Ct. 14, 43 L. Ed. 246; The Vigilancia (C. C. A.), 73 F. 452."

In *Merchants & Manufacturers Securities Co.* v. *Johnson,* 69 Fed. (2nd) 940, the court said, page 945:

> "The receiver was appointed, not to wind up the affairs of the Oil and Petroleum Companies, but to carry on their business as going concerns. He succeeds to the property of the companies subject to the same liens, limitations, restrictions, or contract rights as obtained at the time of his appointment. He has no greater or different rights than those that might have been asserted by the companies. *Fosdick* v. *Schall,* 99 U. S. 235; *In re*: Gotham Can Co., (C. C. A.

2) 48 Fed. (2d) 540; *Ramsey* v. *Marlin Firearms Corp.*, (D. C.) 14 Fed. (2d) 314; *Estes* v. *E. B. Estes & Sons*, (D. C. 24 Fed. (2d) 756.)"

III.

Petitioner was entitled to deduct from collections on pledged accounts reasonable attorney's fees and costs expended in the prosecution of its intervening petition.

Petitioner sought to recover reasonable attorney's fees pursuant to the terms of the contract. When the petition was filed there was an indebtedness owing on the contract in excess of $250,000. The receivers were making collections and refused to turn over such collections to petitioner until directed to do so by the court (R. 43, Par. 13) thereby making it imperative for petitioner to engage counsel. The receivers immediately upon being appointed procured an order of the trial court *without notice to petitioner* authorizing the receivers to turn over to petitioner funds collected by the receivers on assigned accounts *on the same basis as prior to the filing of the bill of complaint,* which order was construed by petitioner to mean that it would be required to return to the receivers one-half of the collections received on assigned accounts. Petitioner contended, and rightfully so, that it could retain all of the collections until payment in full of its indebtedness was made. The contract authorizes this action in the event that the company or any of the accounts are in default (R. 47, 49), and many such defaults existed (R. 64) and the appointment of the receivers constituted an additional default under such contract (R. 48, Par. fifth, Sec. 2). Aside from the strict construction of the contract the record discloses that the accounts petitioner held were merely claims against dealers and distributors of the company for merchandise sold. At the time the intervening petition was filed it was very

doubtful whether the full amount owing to petitioner would be paid. The receivers were evidently in doubt about this matter, because the court entered an order on their petition (R. 61) authorizing the expenditure of $35,000 for "further advertising" for the month of December, 1933, and such $35,000 was paid to the distributors in the form of credits on their accounts for the purpose of inducing them to continue in the fold of Grigsby-Grunow (R. 25). The chief auditor for the receivers testified:

> "There was a price concession on one particular line of a substantial amount. In fact, in my opinion there was practically everything being done, a combination of items, to thaw out the accounts. There were price concessions. We took back merchandise and we put through special allowances. It was necessary to get some money and so we strove to get them." (R. 24.)

Conferences were then held between counsel for petitioner and the receivers in an effort to amicably adjust the matter, without avail (R. 63, 64). With this uncertainty present, petitioner was unwilling to return to the receivers 50 per cent of moneys collected on such accounts receivable and if they were required to obey and follow the order (R. 63) their position might have been seriously endangered. Obviously, in these circumstances, it became necessary for petitioner to engage counsel to protect its interests. The record discloses numerous conferences between counsel for petitioner and the receivers at which various propositions of settlement were offered (R. 63, 64). The intervening petition had to be prepared and filed; appearances, according to the record, were made in court by counsel for petitioner on November 29 (R. 17), December 5 (R. 19), December 14 (R. 65), December 21 (R. 69), December 22 (R. 65, 67), and January 31, 1934 (R. 23, 75). On behalf of petitioner one witness testified that its counsel expended sixteen days' time on this matter in conferences with the receivers, preparing the intervening petition, examining the answers filed by the receivers, in-

vestigating the authorities, preparing the stipulation of facts and the amended stipulation of facts, and preparation of the trial brief (R. 26). An attorney called as an expert testified that in his opinion a reasonable attorney's fee would be $7,800 (R. 29) and no evidence was offered to the contrary.

Petitioner, throughout, has requested a REASONABLE fee and never insisted upon the allowance of $7,800. Notwithstanding such testimony the trial court in its findings of fact (R. 73) and conclusions of law finds that:

> "No evidence was introduced as to the amount of reasonable attorney's fees, if any, for counsel for intervening petitioner, for services necessarily rendered herein." (R. 75.)

In its memoranda opinion, the trial court said:

> "Perhaps the court should say further, concerning the claim for attorney's fees, that the court cannot see any reason for the intervening petitioner having obligated itself for attorney's fees in any considerable amount." (R. 72.)

And in the decree, interest is allowed at the rate of 7 per cent per annum and all further relief prayed for in the intervening petition was denied (R. 76).

The Court of Appeals draws its own conclusion that the attorney's fees amounted to 177 per cent of the maximum amount claimed against the receivers (R. 97) which in view of the foregoing, we submit is without merit.

In numerous cases under similar contracts, courts have allowed attorney's fees in equity and bankruptcy cases.*

In *Boise* v. *Talcott,* 264 Fed. 61, the court says:

> "The items allowed in payment of attorneys' fees and disbursements are fully covered by the contract which provides for payment of 'all legal expenses and reasonable counsel fees.'"

---

* In re: International Raw Material Company, 22 Fed. (2nd) 920; Boise v. Talcott, 264 Fed. 61; Estes v. E. B. Estes & Son, 24 Fed. (2nd) 756; Matter of Lutz & Schramm Company, Inc., 38 A. B. R. 351; In re: Gotham Can Company, 48 Fed. (2nd) 540; In re: Rosenblatt, 299 Fed. 771.

In the case of *In re: International Raw Material Company,* 22 Fed. (2nd) 920, the Circuit Court of Appeals for the Second Circuit approves the payment of attorney's fees under a provision in a contract which says (p. 922):

> "The bankers may employ counsel to advise them and charge the account of the client with attorney's fees actually incurred, or reasonable prospective attorney's fees, and the amount thereof shall be added to the lien of the bankers and be secured by the collateral."

In the matter of *Lutz & Schramm Co., Inc.,* 38 Am. Bankruptcy Reports, 351, the court says (p. 356):

> "As the contract provides for attorney's fees and the amount charged is not claimed to be out of proportion to the services rendered, I am also of opinion that this claim should be allowed."

In the very latest expression on the subject, *Merchants & Manufacturers Securities Co.* v. *Johnson,* 69 Fed. (2nd) 940 (8th Circuit) the amount sought to be recovered by the finance company was $32,479.01 and the trial court denied attorney's fees. On appeal the Circuit Court reversed that decree and allowed the fees as a general claim, and said, page 945:

> "There is no finding by the lower court fixing the amount of such attorney's fees, although there is evidence in the record as to the value of the legal services rendered. We have held that the judge of the trial or appellate court is an expert himself and knows as well as a legal expert what are reasonable attorney's fees. * * * The question was not put in issue by any testimony produced by appellee (receiver) presumably on the theory that no amount should in any event be allowed, or on the theory that the court could determine the reasonableness of the attorney's fees from the record. * * * We therefore fix the fees to be recovered by appellant at $3,000.00."

CONCLUSION.

The policy of the Illinois law as shown by its legislative enactments and as interpreted by the courts of last resort of that state permits corporations to engage themselves to pay any rate of interest whatsoever. Whether this contract is for a loan of money secured by a pledge of the accounts or whether it is for services to be rendered by petitioner, which includes as an incident thereof the advance of large sums of money, is immaterial. In either event the company and the receivers appointed for the company are liable on the contract according to the terms thereof. Federal courts of equity located in Illinois are bound by such statutes. The theory advanced by the Seventh Circuit that the court is not obliged to grant relief where a contract, only because it provides for the payment of a large amount of compensation or interest is unconscionable, is utterly unfounded. This petitioner is in a court of equity, seeking to enforce a substantive right under the statutes of Illinois only because that court took possession of the assets of the company, appointed receivers and enjoined petitioner from bringing a suit elsewhere. No equitable principles are involved in this suit. Even though it may be determined that petitioner is merely a lienor with the accounts as security, it had an absolute right to make the collections on such accounts and deduct therefrom the amount of its advances, plus its costs, expenses and reasonable attorney's fees.

It is respectfully submitted that the decision of the Circuit Court of Appeals for the Seventh Judicial Circuit

should be reversed and the cause remanded to the District Court with instructions to enter a decree in favor of petitioner.

Respectfully submitted,

EDWARD ROTHBART,
NORMAN M. PETERSON,
JULIUS M. ROSENFIELD,
SAMUEL A. DEW,
Counsel for Petitioner.

FILE COPY

Office Supreme Court, U.S.
FILED
JAN 5 1935
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 522

MANUFACTURERS' FINANCE COMPANY,
Petitioner,

vs.

FRANK M. McKEY, as Trustee in Bankruptcy of the Estate of GRIGSBY-GRUNOW COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER.

EDWARD ROTHBART,
NORMAN M. PETERSON,
JULIUS M. ROSENFIELD,
of Chicago, Illinois,
SAMUEL A. DEW,
of Kansas City, Mo.,
Counsel for Petitioner.

INDEX.

PAGE

CASES CITED.

American Iron & Steel Mfg. Co. v. Seaboard Airline Ry., 233 U. S. 261 31
Buckingham v. Orr, 6 Colo. 587 29
Chemical National Bank v. Armstrong, 59 Fed. 372 31
Commercial Security Co. v. Holcombe, 262 Fed. 657 7
Cragin v. Powell, 128 U. S. 691 33
Deweese v. Reinhard, 165 U. S. 386 34
Dorothy v. Commonwealth Co., 278 Ill. 629 7
Estes v. E. B. Estes & Son, 24 Fed. (2d) 756 18
General Motors Acceptance Corp. v. Mid-West Chevrolet Co., 66 Fed. (2d) 1 7
Higgins v. Lansingh, 154 Ill. 301 35
Home Bond Co. v. McChesney, 239 U. S. 568 6
Houghton v. Burden, 228 U. S. 161 ..... 9, 10
In re: Chicago Reed & Furniture Co., 7 Fed. (2d) 885 19
In re: Gotham Can Co., 48 Fed. (2d) 540 ..... 17, 32
In re: International Raw Material Corp., 22 Fed. (2d) 920 16
Jenkins v. Greenebaum, et al., 95 Ill. 11 35
Kothe, Trustee v. R. C. Taylor Trust, 280 U. S. 224 29
LeSueur v. Manufacturers' Finance Co., 285 Fed. 490 ..... 8, 25
Matter of Lutz & Schramm Co., Inc., 38 A.B.R. 351 ..... 18, 24
Mercantile Trust Co. v. Kastor, 273 Ill. 332 6
Merchants & Manufacturers Securities Co. v. Johnson, 69 Fed. (2d) 940 16
Miss. & Mo. R. R. v. Cromwell, 91 U. S. 643 33
National Discount Co. v. Evans, 272 Fed. 570 8
National Fire Insurance Co. v. Thompson, 281 U. S. 331 32

PAGE

National Trust & Credit Co. v. F. H. Orcutt & Son Co., 259 Fed. 830 8
Ramsey v. Marlin Firearms Corp., 14 Fed. (2d) 314 ..... 19, 36
Randolph v. Quidnick Co., 135 U. S. 457 34
Reeves v. Stipp, 91 Ill. 609 30
Richardson v. Louisville Banking Co., 94 Fed. 442 31
Sexton, Trustee v. Dreyfus, 219 U. S. 339 32
Tennessee Finance Co. v. Thompson, 278 Fed. 597 7
Thomas v. Western Car Co., 149 U. S. 95 31

STATUTES CITED.

Cahill Ill. Rev. Statutes, 1933 Ed. Ch. 32, Sec. 8, P. 725 9
Cahill Ill. Rev. Statutes, 1933 Ed. Ch. 32, Sec. 5 (h) P. 725 6

TEXT BOOK CITED.

17 Corpus Juris, 813 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 522

MANUFACTURERS' FINANCE COMPANY,
Petitioner,

vs.

FRANK M. McKEY, as Trustee in Bankruptcy of the Estate of GRIGSBY-GRUNOW COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER.

In making this reply, we will endeavor to answer all of the arguments advanced by respondent in the same order as made in respondent's brief.

At page 1 respondent contends that the receivers were at all times willing to pay petitioner its advances and compensation, pursuant to the contract up to the date of their appointment, and 7 per cent interest thereafter. This is incorrect. The bone of contention prior to the filing of the intervening petition arose out of the act of the receivers the day following their appointment, in procuring an *ex parte* order whereby the receivers obtained author-

ity to deliver to petitioner funds coming into their possession from assigned accounts receivable *on the same basis as prior to the filing of the original bill of complaint* (R. 63). When petitioner was advised of said order it strenuously objected to the italicized portion and contended that while the order may on its face look harmless, actually it might result in a substantial loss to petitioner, and that it would be unwise for petitioner to turn back any part of the collections until it was reasonably assured of full payment of the amount due to it out of the accounts it then held (R. 63). Conferences thereupon ensued between the receivers and counsel for petitioner (R. 64). The receivers demanded that petitioner pay over one-half of the collections on assigned accounts or permit the receivers to retain one-half thereof, which was not agreeable (R. 63). The reasons petitioner then gave for such refusal were that under the terms of the contract it was not required to return any part of the remainder (R. 63, 64); that there were numerous breaches of warranties materially affecting the value of the accounts; and mainly, that it feared sustaining a substantial loss in the event that some of the accounts were not paid in full (R. 64).

The record discloses that thereupon the receivers offered to recognize a *general* claim by petitioner for the amount of such loss, which claim would have been in the same class as that of other unsecured creditors (R. 64). When the receivers were appointed petitioner held $550,000 in accounts, out of which to collect approximately $265,000 (R. 13). The money was owing by dealers and distributors of the Grigsby-Grunow Company and the ultimate collectibility of the accounts was then in considerable doubt (R. 24), notwithstanding that the trial court found that there never was any doubt but that to the amount of collections petitioner would have been paid (R. 72) and notwithstanding that the Court of Appeals accepted as proven the alleged fact that there was never any question

but that petitioner would be paid in full, plus interest after receivership at the rate of 7 per cent per annum (R. 95).

The record is not clear, but in respondent's brief, at page 7, he says:

> "The assigned accounts were owed largely by so-called distributors (R. 25), who purchased radios, tubes, and refrigerators and in turn sold to wholesalers and retailers. The receivership tended 'to freeze' these accounts and for a week or ten days collections were small (R. 24). To induce the distributors to pay, to enable them to pay, and to avoid litigation over set-offs, it was necessary to assist the distributors in 'moving' their merchandise, and it was necessary to reduce prices on certain items (R. 24) and to take back some merchandise (R. 24). To assist in 'moving' their merchandise the receivers expended $35,000 in local advertising (R. 24, 25, 71, 74). The receivers also held distributors' meetings in New York and Chicago (R. 24, 25), and performed other special services particularly in connection with one of the assigned accounts which was $100,000 in amount. (R. 64.)"

The expenditure by the receivers of $35,000 in local advertising to assist in moving merchandise sold to dealers and distributors and the other acts of the receivers done they say, to stimulate collections, is sufficient evidence that there was considerable doubt as to whether these accounts would be paid in full. The very purpose of taking accounts in twice the amount of cash advanced was to protect the petitioner in the event it was unable to collect the accounts in full.

The record is silent as to the reason why the receivers retained these collections and we submit that the excuse now tendered by respondent at page 3 of his brief that "some part of the period of 35 days was attributable to appraisal of the validity of the assignments, to audits, to notice to parties to the record and in obtaining

orders of court" appears for the first time and is not to be found anywhere in the record. The latter portion of the sentence "the money collected meanwhile reposing securely in a special bank account" being the only portion of that sentence referred to in the reference to the record (R. 74).

Indicative of their anxiety to pay petitioner, respondent stated (Resp. Br. 3) that "each order for payment to petitioner was upon the receivers' own motion" and refers to Record 67 and 68. What actually occurred, however, is more clearly shown by the amended stipulation of facts at the top of page 65 of the record. It is there stated that on the receivers' motion to pay the finance company they were authorized to pay $140,000 on account, over the objections of attorneys for the petitioner who requested that the order at that time be for $223,973.55 and represented moneys collected on accounts theretofore assigned to petitioner. On December 12, 1933, there was a similar occurrence. The receivers then had $56,732.16 and over the objections of petitioner the court required them to pay merely $36,159.30. The stipulated facts also show that the receivers refused to pay petitioner until directed to do so by the court (R. 19). This attitude of the receivers is further emphasized by the detailed order entered, which recites that the payment of the $140,000 and the $36,159.30 above mentioned by the receivers to be without prejudice to either intervening petitioner or the receivers as to any point or issue in the intervening petition or the answers thereto, or on any point which may be added by amendment by either party (R. 67). If there was no controversy between the parties, why these reservations?

Instead of a willingness to pay petitioner in full, it would seem that the serious dispute between the receivers and petitioner resulted from the effort by the receivers to deduct 50 per cent from collections on assigned accounts and to force petitioner into this bargain, the receivers retained all of the collections (R. 19). We insist that the acts of

the receivers as shown by the record are to the contrary of their present contention and instead of a willingness to pay, it is evident that the day following their appointment the order was entered on their own petition, the result of which was to adjudicate petitioner's rights without a day in court and without any opportunity to be heard.

The next point made is that petitioner (Resp. Br. 2) asserted a claim for $7,800 attorney's fees and they refer to Record 29. This, we submit, is thoroughly misleading and incorrect. At no time did the petitioner ever ask for $7,800. Throughout these proceedings it requested reasonable attorney's fees and one witness called as an expert testified that in his opinion, based on an hypothetical question submitted to him, $7,800 would be a reasonable fee. By this unfair attitude the receivers apparently persuaded the trial court into believing that petitioner was making claim "for a large sum of money, something in excess of $7,000 for attorney's fees in and about enforcing its claim" (R. 70), and in the findings of fact further persuaded the District Court to make a grossly erroneous finding that "no evidence was introduced as to the amount of reasonable attorney's fees, if any, for counsel for intervening petitioner for services necessarily rendered herein." (R. 75.) The Court of Appeals followed the finding of the lower court and the argument of respondent, and found as a fact that petitioner was asking for $7,800 attorney's fees (R. 95).

The facts relating to the necessity for petitioner retaining counsel and the amount in dispute are fully covered in our main brief, pages 26 to 29.

The next point made (Resp. Br. 2) is that the contract in evidence has been held by courts to be a contract for the loan of money with a pledge of the accounts as security and not what it purports to be, a contract for services and for the sale of accounts.

In the note a number of authorities are cited which we shall take up separately and point out why these cases do not apply.

In *Home Bond Co.* v. *McChesney,* 239 U. S. 568, the contract is different from the contract in the instant case in that it does not provide for the rendition of any services by the finance company. The trustees' answer claimed that the contract was a mere sham to cover up an usurious transaction. The bankrupt was a Kentucky corporation and the finance company an Indiana corporation, and under the laws of both states usury was prohibited. There was a stipulation of facts, under which the special master found that the contracts were not sales of the accounts, but security for loans. Here, there is not one vestige of proof or claim by the receivers that all of the services rendered by petitioner required by it to be rendered under the contract were not actually and in fact rendered. The value of the services are not in dispute and under the Illinois law as pointed out in our main brief, since 1919 corporations are prohibited from defending on the ground of usury. (Cahill's Ill. Rev. Stat. 1933 Ed. Chap. 32, Sec. 5 (h), p. 725.)

In *Mercantile Trust Co.* v. *Kastor,* 273 Ill. 332, the contract is almost identical with the contract in the *Home Bond* case. No provision whatever is made for the rendition of any services by the finance company. That decision was made in 1916, three years before the Legislature of Illinois adopted statutes permitting corporations to pay any rate of interest, without regard to or restriction under the usury laws of the state (Cahill's Ill. Rev. Stat., 1933

Ed., Ch. 32, Sec. 5 (h), p. 725), and the defense claimed that the contract was an usurious agreement for the loan of money, which was *ultra vires* the finance company and forbidden by the laws of Illinois, and the court found that there was no dispute in the evidence relating to this question (p. 337).

Dorothy v. *Commonwealth Co.,* 278 Ill. 629, was decided subsequent to the *Kastor* case and the court in their first sentence of the opinion states that the facts are similar to the *Kastor* case. The contract which is set out in the opinion does not provide for the performance of any services by the finance company and the rendition of services is not claimed.

General Motors Acceptance Corporation v. *Mid-West Chevrolet Co.,* 66 Fed. (2d) 1, arose in Oklahoma where by law a corporation may recover usury paid. That case does not involve a contract similar to this, but involves the purchase of conditional sales contracts and chattel mortgages resulting from the retail sale of automobiles. It was there held that the plan was not usurious. The court, however, says (p. 4):

> "Whether a transaction is tainted with usury is a question of fact but like all other questions of fact it is a question of law whether the proof discloses substantial evidence thereof."

Here, there is no claim of usury by the receivers.

Tennessee Finance Co. v. *Thompson,* 278 Fed. 597, involves a claim for wages assigned to a finance company and does not involve the construction of any contract similar to the one in the instant case.

Commercial Security Co. v. *Holcombe,* 262 Fed. 657. The contract is not described in the opinion, but we think it is safe to assume that it does not involve any question of services rendered by the finance company, and furthermore,

under the laws of the state where the bankrupt was organized, corporations could defend on the ground of usury.

National Discount Co. v. *Evans,* 272 Fed. 570. The bankrupt was an Ohio corporation and the finance company did business in Ohio. The court found that the contract was made and was to be performed in Ohio, where at that time interest in excess of 6 per cent was considered as usurious and corporations could defend on that ground. There is nothing in the opinion to show that the terms of the contract provided for the performance of any services by the finance company.

In *LeSueur* v. *Manufacturers' Finance Co.,* 285 Fed. 490, the contract does not provide for the rendition of any services by the finance company. An additional defense urged was that the finance company was doing business in Tennessee without authority. The court held that the finance company could recover the principal of its advances, together with interest at 6 per cent for the reason that under the statutes of Maryland, loan contracts were invalid only to the extent of interest in excess of 6 per cent per annum (p. 498 opinion).

In *National Trust & Credit Co.* v. *F. H. Orcutt & Son Co.,* 259 Fed. 830, two defenses were urged. One that the contract was for the loan of money and not a sale of the accounts, and hence usurious under the Illinois law, as it then existed, and secondly, that the contract was *ultra vires* the finance company, following the theory and reasoning of the *Kastor* and *Dorothy* cases. The matter arose in the 7th Circuit and was an appeal from the Northern District of Illinois. The opinion does not set forth the contract, but there is an abundance of evidence and testimony in the record as to the intention of the parties that this was to be a loan and not a sale.

The foregoing cases, in our judgment, do not apply for the reason that they all arose under contracts with cor-

porations who had no power to loan money under their corporate charters or the borrower by state law had the right to urge usury as a defense. Not one single contract corresponds to the theory of the contract in the instant case. The disguise of the form of the transaction is apparent in each of the cases cited. Here, no necessity exists for any disguise because by statute Illinois corporations are permitted to pay any rate of interest they see fit and *ultra vires* is no longer a defense. (Cahill's Ill. Rev. Stat. 1933, Ch. 32, Sec. 8, p. 725.)

If this contract provided for a straight loan and the interest was calculated in the same manner that the compensation is figured in this contract, and the note contained no provision whatever for the rendition of services by petitioner, the note would be collectible, even though it provided for the payment of interest at a rate of 28.3 per cent.

The court will observe that none of the foregoing decisions arose in equity. They are all matters in bankruptcy where the borrower or the seller of the accounts was *insolvent.*

Not one single case refers to any services to be rendered by the finance company. In this contract there is a vast amount of services to be rendered by the finance company, who alleges full performance. The receivers by their answer do not deny that such services were rendered, and therefore that fact would seem to be admitted.

It would seem to us that the facts in the instant case, as stipulated by the parties and the small amount of testimony that was offered, falls clearly within the decision of this court in *Houghton* v. *Burden,* 228 U. S. 161. There, Canfield, the bankrupt, borrowed $10,000 from Burden and as security assigned $14,000 in book accounts. Under the terms of the contract Burden was to render a small amount of service to Canfield. The loan was to be paid with 6 per

cent interest, and in addition thereto, compensation of 1 per cent per month upon the amount of the accounts remaining uncollected at the end of each month was agreed upon. This court says, page 170:

> "The instrument upon its face is not usurious. Of course, if the service to be rendered should be made to appear trivial and of no real importance, the inference might be drawn that the agreement in that particular was a sham and device to cover a mere usurious contract, such as we are asked to believe Burden declared it to be. Burden's plan was that the loan should carry with it light work, such as a retired business man might do,—one or two hours of office work each day, as he explained. * * *
>
> "To hold the agreement void would seem to require that we shall accept as true that there was no such service expected or required, and that the clause was inserted to cover a usurious bonus."

In the contract under consideration petitioner agreed to furnish credit information about its customers to the Grigsby-Grunow Company; have its auditors give the company the report of each examination provided for in the contract, with full information and advice as to the most desirable method of keeping the company's books, records and accounts; pay for all accounting, postage and credit investigations of accounts purchased or offered for purchase under the contract, and upon request to give financial and business advice; obtain and have on hand at all times sufficient funds to purchase acceptable accounts within the limits agreed upon under the contract; supply all forms needed for the assignment of accounts; place petitioner's credit and collection department at the disposal of the company and permit submission of its sales contracts to the general counsel of petitioner for advice and opinion as to the form and legality thereof. The value of these services is not in dispute. The method of calcu-

lating the compensation is very similar to that used in the *Burden* case. Burden was to receive 1 per cent per month upon the amount of the uncollected accounts at the end of each month. In this instance petitioner was to receive for services and the advance of money, and in lieu of all interest, 83½ per cent of 1/30 of 1 per cent of the net face amount of accounts for each day from the date of purchase by, until paid to, petitioner.

It is elementary that courts have the right and the duty to look through a contract in order to discover the intention of the parties and if it finds that the parties intended to violate the usury, or any other, statutes, that fact may be established; but this cannot be done without pleadings or evidence. Even if it be conceded that the petitioner did make a contract with the company for a loan of money it is respectfully insisted that this is valid under the law and is no part of the issues here, for the reason that it was not raised in the pleadings and no proof whatever was presented to the District Court on that subject.

At page 3 respondent argues that petitioner never asserted charges against the Grigsby-Grunow Company in excess of 20 per cent. The answer is obvious. Before the receivers were appointed, the company fully performed its agreement, remitted collections to petitioner each day as received, an adjustment was made and the remainder of the purchase price paid by petitioner to the company. If the company had deposited all of the collections in its bank account and refused to remit the same to petitioner the rate of compensation would have increased.

Moreover the receivers did not pay any specific accounts collected. Pursuant to orders of court they paid lump sums, hence petitioner was estopped from applying such payments to specific accounts so as to reduce the aggre-

gate balances of accounts outstanding. The District Court found that petitioner "no longer made such adjustments so as to maintain the outstanding balances of cash advances at one-half the aggregate amount of accounts receivable and trade acceptances assigned, and applied literally the provisions of the contract which permitted the charging of interest at the rate of 10 per cent per annum upon the aggregate amount of accounts receivable and trade acceptances remaining assigned, notwithstanding the reduction from time to time in outstanding balances of cash advances." (R. 73.) Under the circumstances petitioner could not do otherwise. The computation of compensation at the contract rate was shown as $4,394.48 (R. 45); interest at 7 per cent as $1,087.93 (R. 45) and at the rate of 20 per cent as $3,096.22 (R. 63). It appears that the District Court could, with much greater consistency, have adopted the latter rate, which it did as to compensation accruing prior to the date of receivership, but paid after that date by the receivers.

The Fund Created by the Receivers.

The main point urged under this heading, by the respondent, is that the petitioner at no time gave or sought to give notice of the assignments to the debtors of the accounts. In this connection it will be observed that in the order appointing the receivers (R. 9) all persons were "enjoined from interfering with said receivers in the possession of said property of said defendant, and in the administration of their trust and in the performance of the duties imposed upon them as receivers herein," and in the petition of the receivers filed Novevmber 25, 1933 (R. 10, 11) the receivers stated that "under the terms of said contracts * * * the finance companies have the right to notify debtors under said accounts receivable, which debtors are distributors and dealers, and said finance companies have

the further right to send their representatives to the office of the defendant corporation, at the expense of the defendant corporation, to check moneys received by the defendant corporation on said accounts receivable * * * If said finance companies did notify the debtors under said accounts receivable, so assigned, great loss would inure to the good will of the defendant corporation, or if said finance companies sent representatives to the office of the defendant corporation to check up said accounts receivable, a large expense would be entailed by the defendant corporation," (R. 11) and in the answer to the intervening petition the receivers allege that the contract involves merely a loan of money to the amount of the advances, and "that no notice having been given to debtors of accounts, the barring order heretofore in this proceeding entered, restrains the intervening petitioner from giving any notice upon such contract." (R. 18.) The respondent further argues that because the finance company did not give notice to debtors it became the duty of the receivers to make these collections of all of the accounts then assigned and in making such collections they spent $35,000 in "further advertising" and that few, if any, of these acts done to stimulate collections could have possibly been performed by the finance company.

The fallacy of this argument lies in the fact that under the terms of the contract it was the obligation of the company to deliver to petitioner on the day of receipt thereof, all original checks, drafts, notes and other evidences of payment received in payment of the accounts purchased by petitioner (R. 47). No duty devolved upon the receivers to make these collections. They were mere volunteers. In the final analysis, however, it probably was more economical for them to make the collections by reason of the company's acquaintanceship with the dealers and distributors, who were the principal debtors, than it would have

been for the finance company, but in this respect the contract provides that if the finance company does make the collections, it shall be reimbursed the expense thereof. Let us see what would have happened if petitioner would have given notice after these orders had been entered by the District Court, first, it undoubtedly would have been in contempt (R. 9); second, the good will of the company would have been injured (R. 11); third, and the expense incurred in giving such notice would have been chargeable to the funds collected (R. 11). Considered from any point of view, respondent's argument that because notice was not given the receivers went to the expense of $35,000, is without merit.

Our argument in full with respect to the $35,000 expenditure and the apparent reasons therefor appear at pages 26 and 27 of our main brief.

Delays in Payment Inherent in Receivership Administration.

The argument under this point, it seems to us, is wholly inconsistent with the argument by the receivers that they were at all times willing to pay the petitioner in full, plus interest at 7 per cent. The gentlemen who were appointed were not professional receivers. May we call the court's attention to the record which shows that one of the receivers, Leroi J. Williams was the vice president of the Grigsby-Grunow Company and signed the contract (R. 52) and the other receiver, Thomas L. Marshall, who now appears as attorney for the respondent, was, during the time of the receivership, the attorney for, and director of Manufacturers & Dealers Finance Corporation to whom the Grisby-Grunow Company had also sold certain of its accounts receivable, presumably under a similar contract (R. 29). To conclusively show that both receivers knew and understood the contract in every respect, we find that

the day following their appointment they appeared in the District Court, and in their petition set forth all of the terms of the contract and the rights of the receivers and the liability thereunder and procured an order to be entered under which they would have operated the business on funds belonging to this petitioner (R. 12) if petitioner had not intervened (R. 13). The record discloses that the intervening petition was filed November 29th and on December 6th the answer of the receivers was filed. The matter was then at issue. The suggestion now made that the receivers did not have an accounting of collections upon the trade acceptances is not borne out by the record. It is difficult to conceive that receivers, as aggressive as these receivers apparently were, would not know at all times exactly where moneys were, which belonged to the estate. A telephonic request would have procured the information they now claim contributed to a delay of thirty-five days in settling with petitioner. We submit that this last thought of the receivers is without much force.

Attorney's Fees.

This point has been covered fully heretofore, and it is submitted that the findings of fact as shown by respondent's brief and the court's opinion are wholly inconsistent.

In the findings, the court holds that NO evidence whatever was introduced as to the amount of reasonable attorney's fees, and in the opinion the court says that it cannot see any reason for intervening petitioner having obligated itself for attorney's fees in any considerable amount. The stipulated facts in this case and the record conclusively show that there was evidence of the expenditure of a vast amount of time by counsel for petitioner and in a matter involving over $250,000 ample justification for engagement of counsel appears, and reasonable attorney's fees should have been allowed.

This has been covered in our main brief, pages 26 to 29.

The Purported Conflict Between Circuits.

Under this heading the respondent endeavors to show that there is no conflict between the 2nd and the 7th Circuits. We believe that this argument relates to the question of jurisdiction heretofore considered by this court in granting certiorari and therefore requiring no reply.

Under this point it is also argued that the case of *Merchants & Manufacturers Securities Co.* v. *Johnson*, 69 Fed. (2nd) 940 (8th Circuit) and *In re*: *International Raw Material Corporation*, 22 Fed. (2nd) 920 (2nd Circuit) are not in conflict with the instant decision.

In the *Johnson* case 6 per cent interest after receivership was the only prayer of the finance company. That case involved questions of doing business in Missouri without authority as a foreign corporation and involved the construction of the state constitution which provides for the forfeiture of the lien of a pledge if interest in excess of 8 per cent is exacted. Both questions, in so far as they related to a finance company doing business in Missouri had never been passed upon, and those being the more important questions in the case, the finance company did not question the allowance of interest after the appointment of the receiver and assigned no error thereon. The *Johnson* case was cited on the matter of allowance of attorneys' fees.

In the *International* case the court squarely passed upon the question as stated in the opinion:

> "Can an agreement by a corporation to pay a rate of interest or a commission in excess of the legal rate be held invalid by a court of bankruptcy, having the custody of a fund which is collateral security for the performance of the agreement, upon the ground that a lien upon that fund for an excessive rate is unconscionable and should not be sanctioned by a court of equity?" * * * "The contention that an agree-

ment by the bankrupt corporation to pay more than 6 per cent., be it called commissions or interest, was illegal, and should not be enforced against the collateral, is largely based upon the recent decision of the Circuit Court of Appeals of the 8th Circuit (should be 7th) in the case of *In re*: Chicago Reed & Furniture Co., *supra*. The court there held that, irrespective of the usury law of Illinois, a court of bankruptcy would not enforce an agreement which in that case involved payment from the proceeds of mortgaged property of an amount due for commissions and interest calculated at a rate of over 40 per cent. per annum. Here there seems to be no doubt that the parties agreed among themselves to pay 6 per cent. as interest on the loan and the additional sum of 1½ per cent. per month as a so-called commission. We know of nothing to prevent such an agreement. The New York statute provides that no corporation shall interpose the defense of usury, and this has been held in effect to repeal the usury laws so far as the contracts of corporations are concerned. Neither the corporations, nor those who may succeed to their rights, nor their sureties, are heard to object to their bargain, either at law or in equity, because of usury. *Curtis* v. *Leavitt,* 15 N. Y. 9; *Stewart* v. *Bramhall,* 74 N. Y. 85; *Gamble* v. *Queens County Water Co.,* 123 N. Y. 108, 25 N. E., 201, 9 L. R. A. 527; *Hubbard* v. *Tod,* 171 U. S. 474, 19 S. Ct. 14, 43 L. Ed. 246; The Vigilancia (C.C.A.) 73 F. 452."

The receivers then admit that the Second Circuit in *In re*: *Gotham Can Co.,* 48 Fed. (2d) 540, does allow interest at the contract rate after receivership. The *Gotham* case is only one of many allowing compensation under this form of contract subsequent to the appointment of a receiver. In the *Gotham* case the contract is not set forth but the subject matter as disclosed by the opinion is almost identical with the facts in the instant case, and one of the main items in dispute was compensation after adjudication. With respect to this phase of the case the court said (p. 541):

> "The finance company might be regarded as entitled to hold the accounts until they were all collected, even though its cash advances and expenses up to any particular date were satisfied. If so, the one-thirtieth of 1 per cent. daily charge could continue to roll up so long as any accounts remain unpaid. And this would be true whether the transactions were regarded as sales or loans."

In Matter of Lutz & Schramm Co. Inc., 38 A.B.R. 351 compensation subsequent to the appointment of the receivers was one of the principal issues. The receiver contended that he was not liable for compensation subsequent to his appointment and the court said (p. 355):

> "When the receiver took possession of the assets, it found that certain accounts had been duly sold and assigned on the books of the bankrupt to the Credit Company and were duly ear-marked as their property. With knowledge of this fact, the receiver subsequently received into its hands funds belonging to the credit company on account of the accounts so assigned. These funds belonged to the Credit Company. The moving consideration for the purchase of the accounts was the compensation to which the company was entitled. * * * And under the authority of the court the receiver continued the operation of the business of the bankrupt concern in order to preserve its good will. In connection therewith, it collected the accounts which had been sold to the Credit Company."
> * * *
>
> "The receiver represents the estate of Lutz & Schramm, and its rights are no broader than those of the bankrupt. * * * The amount of compensation depended upon the time of payment. Under all the circumstances of the case, I can see no legal reason why the claimant is not entitled to the compensation provided in the contract."

In *Estes* v. *E. B. Estes & Son,* 24 Fed. (2d) 756, the receiver filed a petition for instructions, stating that the

finance company had been paid in full under the contract, excepting that it was claiming compensation, attorney's fees and other charges, concerning the legality of which claim the receiver is in doubt. In that connection the court, at page 757, said:

> "The service rendered for which the Estes Company was willing to pay was the advancement of money upon its receivables enabling it to use the proceeds of the accounts without waiting their maturity or payment. This service was rendered and was quite likely all the parties actually contemplated. The court is not called upon to inquire into the reasonableness of this compensation. It is the contract which the Estes Company entered into and the receiver is bound thereby, even though it should be deemed to be of little or no advantage to the company. See *Ramsey* v *Marlin Firearms Corp., supra* (14 Fed. (2d) 341). The receiver therefore, is instructed not to resist the claim of the finance company for compensation accruing both before and after his appointment."

See also *Ramsey* v. *Marlin Firearms Corporation,* 14 Fed. (2d) 314.

Respondent says (p. 11) that petitioner repeatedly attacks the case of *In re: Chicago Reed & Furniture Co.,* 7 Fed. (2d) 885, and quotes from the opinion in that case where the court announces the rule that the Illinois statute permitting corporations to pay any rate of interest did not abrogate the rule that courts of equity will not lend their aid to enforce contracts which, upon their face, are so manifestly harsh and oppressive as to shock the conscience, and this has been fully and completely answered at pages 17 to 23 of our main brief. We contend that this principle of law is not applicable to a case where a Federal court sitting within Illinois appoints receivers in equity of a *solvent* corporation, and where the rate of compensation or interest is permitted by state laws, and particularly where an intervenor is not seeking equity, but merely asserting its legal rights in an equity suit.

The Position of the Finance Company Is That It Can Place Upon the Receivers the Large Expense of Conservation and Collection of the Accounts and, Without Contribution Thereto, Can in Equity Even Charge the Receivers 28-3/10 Per Cent Interest for the Period During Which the Receivers Were Creating the Fund to Pay the Finance Company.

Again the receivers discuss the fact that the finance company did not give notice to debtors of the assignments, and conclude that petitioner was powerless to accomplish, with the distributors, what the operating receivers were able to accomplish. The receivers are seeking to fasten a liability on the finance company to pay a portion of the $35,000 expended by the receivers for "further advertising."

The contention of the receivers that petitioner should be charged with the cost of collecting the assigned accounts, notwithstanding the contract to the contrary, and the finding of the District Court that no offer was made by petitioner to contribute to such expense, is without force.

On December 1, 1933, two days after the intervening petition was filed the receivers filed a petition (R. 58), in which they set forth that:

> "Some forty distributors assembled in Chicago November 28, 1933 and in a meeting urged upon the receivers that a conservative advertising appropriation be made for immediate newspaper advertising in the 52 centers of the United States involved. The reasons for this request were preservation of the good will of the business, furthering of the moving of merchandise from dealers' and distributors' stores and warehouses, and fundamentally the building up of a foundation for the new lines in January and, above all, the immediate showing to the public that the Majestic radios and refrigerators are not out of business and can still be bought with assurance that the business is being maintained and will be maintained."

And on the same day the trial court entered an order authorizing said receivers:

> "In the operation of the business, to expend from the assets of the receivership estate for further advertising during the month of December 1933 the sum of $35,000.00." (R. 61)

How was petitioner to know that the receivers intended to ask that it pay a portion of the collection expense when not one word is mentioned in the receivers' petition. The receivers, by their answers to the intervening petition, contend that such advertising expense was incurred for the purpose of realizing on assigned accounts receivable. The testimony in this respect came from Mr. Whitfield, chief accountant for the receivers and substantially is that at the time of the receivership the collections were practically at a standstill and so remained for a week or ten days. Over objections by petitioner to the line of examination the witness was permitted to state:

> "There was a price concession on one particular line of a substantial amount. In fact, in my opinion there was practically everything being done, a combination of items, to thaw out the accounts. There were price concessions. We took back merchandise and we put through special allowances. It was necessary to get some money and so we strove to get them." (R. 24.)

This same witness, on cross-examination, testified that the distributors were more or less at sea and did not know whether business was going to continue and hence expected some difficulty in collecting the accounts. When pressed to explain what the advertising consisted of the witness stated:

> "The advertising generally consisted of special appropriations to the distributors of money to be spent by them. It was not paid in cash. It was just in the form of credit memos to their accounts." (R. 25.)

"Q. Well, just what was the advertising? * * * *
A. It was allotted to the distributor.
Q. To do advertising?
A. In the local territory.
Q. Just an inducement to the distributor to continue in the fold of Grigsby-Grunow?
A. To continue with Grigsby-Grunow." (R. 25.)

Nowhere in the record or the stipulation of facts does it appear that one cent of the $35,000 was expended in connection with any account assigned to petitioner. The court's finding in this respect was not based on anything in the record. What amount the receivers were asking that petitioner be required to pay or contribute is not expressed in the answer or in the findings by the court. Without any testimony or evidence of any kind, the trial court could not have arrived at any amount that petitioner was to pay or be charged with. How the expenditure by the receivers of $35,000 for "advertising" helped to collect the assigned accounts, no one can accurately determine. Whether the petitioner profited by the expenditure is highly conjectural. The record discloses that at the time the receivers were appointed the petitioner had over $550,000 in assigned accounts and trade acceptances, and the balance of money then due it was less than $275,000. Before the advertising appropriation was expended the Ford Motor Company paid the receivers $100,000, which account was then owned by petitioner (R. 64). There was then on deposit in the special bank account of the receivers over $50,000 resulting from collections on the accounts held by petitioner (R. 64). Petitioner had indefensible trade acceptances in the sum of $85,647.22 (R. 44). The last three amounts total $235,647.22. Following the receivers' contention to a logical conclusion, one finds that before any part of the advertising appropriation was spent, less than $40,000 would have paid off all claims of petitioner, and petitioner had accounts in the sum of $314,352.75 out of

which it could collect such balance. To collect $40,000 the receivers contend they spent $35,000 for advertising, which "redounded to the benefit of petitioner" and hence petitioner should pay for such advertising.

Before the receivers were appointed the accounts apparently were paying in due course, but perhaps because of the appointment of receivers the distributors were worried whether Grigsby-Grunow Company would continue in business, and the receivers, in order to assure the distributors of the continuance of business and to preserve their good will and patronage made "price concessions on one particular line of a substantial amount * * * Took back merchandise and put through special allowances." Were the receivers worried that petitioner would not be paid in full its balance of $40,000 out of $314,000 in accounts, or were they endeavoring to collect the remainder after petitioner was paid in full? If the receivers expected contribution for such advertising why was not that matter discussed with its counsel? Why was not something set forth in the petition that the advertising expenditure was "to thaw out accounts" that had been assigned to petitioner, and why was there no request of the court that an order be entered that a portion of such advertising expense should be borne by petitioner, thereby giving it an opportunity to be heard and presenting its point of view? When we consider the entire petition for advertising wherein the receivers advise the court that the company intended to expend $100,000 for advertising during the month of December, 1933, and that prior to the receivership the entire advertising program was cancelled with the exception of the double page in the Saturday Evening Post, which was released several weeks prior to the receivership (R. 57); that there still remains in the hands of distributors 43,629 radios and in the hands of dealers 21,000 radios and in the hands of the factory 13,000 radios, and 22,000 other radios partially completed, all of which such merchandise

should be cleared prior to January, when new models will be produced (R. 58); that the receivers believed that a reasonable amount of advertising is essential in order to move such goods and that successful operation of the receivership as a going concern could not countenance dumping of the merchandise either by the dealers, distributors or by the factory, and such a result has not so far happened; that of the foregoing radios substantially the entire amount of 64,000 sets in the hands of distributors and dealers are represented by accounts receivable and that the ability to dispose of these radios by such dealers and distributors determines the soundness of the account, and that the accounts aggregate approximately $1,500,000. There are other matters recited in that petition, which concludes with this prayer:

> "Your petitioners are clear that both preservation of the good-will of the business and its operation as well as the preservation of the FREE accounts receivable and the equity in pledged accounts require their action." (R. 60.)

all of which shows that when the matter was presented to the District Court no thought existed in the minds of the receivers that any part of the expense of advertising was to be charged to the petitioner, but that the expenditure was made, as the petition recites, to retain and preserve the good will of the distributors and dealers. *In the Matter of Lutz & Schramm Co., Inc.,* 38 A.B.R. 351, where the receiver made a similar contention the court stated:

> "The collection of the accounts by them was for the benefit of the bankrupt estate, so as not to interfere with the preservation of the good will."

This is not a case of an insolvent company, but the case of one that is abundantly solvent (R. 3), and no proof whatever exists of the actual cost to the receivers of making the collections of the assigned accounts. Irrespective of that, whatever the expense, it was the liability of the

company and not the petitioner. Nothing is being taken from general creditors, but whatever the collection expense amounts to comes out of stockholders of the Grigsby-Grunow Company, the very same stockholders whose directors and agents signed the instant contract, were aware of its terms and fully expected to abide thereby.

LeSueur v. *Manufacturers Finance Co.*, 285 Fed. 490 relied upon by respondent presents an entirely different situation. There a contract was entered into between petitioner and the manufacturing company for the purchase of accounts receivable. The manufacturing company became financially involved and by act of its stockholders a committee was appointed to take charge of and liquidate its business, and subsequently a *new* agreement was entered into between the committee, the manufacturing company and petitioner, by which the manufacturing company agreed to forward by mail to petitioner, all original remittances and collections on accounts theretofore purchased, the contract containing the proviso:

> "With authority to the latter (finance company) to apply the same in accordance with the terms of the original contract of July 26, 1912, but without prejudice to the rights of the Manufacturing Company and its committee with 'respect to the matter of usury, or any other matters under' that contract, and the transactions had thereunder.* * *"

For a short period thereafter, the committee remitted collections and thereafter refused so to do, contending that the contract was usurious and void, and that the finance company was doing business in Tennessee without authority. Petitioner filed its bill of complaint asking for a decree against the liquidating committee, requiring such committee to deliver up all the accounts not collected and in default, or for the amount thereof, as well as for other relief. The defense was that the contract was usurious and the proceedings thereunder void, and that petitioner

was doing business in Tennessee without authority. The District Court first held that the contract was usurious under the laws of Maryland and void, and entered a decree accordingly. The court's attention was then called to a decision by the Court of Appeals of Maryland and the court then held after a reargument of the case, that the loans were not void, but the only effect of usury was to void the excessive interest over the legal rate. The first decree was set aside and the matter referred to a master, who found that the company was entitled to recover their advances plus 6 per cent interest and rejected the defendant's contention that the petitioner should be charged with expenses incurred in collecting the assigned accounts. A final decree was entered in accordance with the report of the master, and affirmed by the Court of Appeals, and with respect to the cost of the collections to the liquidating committee, the court says (p. 500):

> "In our opinion, however, the liquidating committee should have been allowed the cost of the collections which it made, the amount of which, as shown by uncontested evidence, is $4,446.52. True, by the agreement of 1912, between the Finance Company and the Manufacturing Company, the latter was to make collections at its sole expense, and in the agreement of July 30, 1914, between the liquidating committee and the Finance Company, the former agreed to forward remittances for accounts collected, 'in accordance with the terms of said contract of July 26, 1912,' there being, however, otherwise no reference, direct or indirect, to the cost of collection. The Manufacturing Company, however, is *insolvent;* its general creditors cannot be paid in full; the decree in plaintiff's favor exhausts the entire fund in the committee's hands arising from the collection of the assigned accounts; and unless expense of the collections by the committee upon these accounts is paid out of the amounts collected, the result is that such expense must be paid by general creditors. Assuming that the committee had power to agree to pay the expenses out of general

> assets, provided there remained sufficient to pay general creditors in full, not only is it open to serious doubt whether the committee had power to make such agreement as against general creditors of an insolvent estate (especially in view of the terms of the stockholders' assignment to the committee), but in our opinion to impose such liability would be inequitable as against general creditors."

Obviously, the situation in the *LeSueur* case was different than in the instant case. Here, receivers were appointed to operate the business of a solvent corporation having assets of $13,000,000 over and above all liabilities (R. 3). The receivers made credit allowances in the sum of $35,000 to their distributors to retain their good will and to continue their business relationship. In the *LeSueur* case the company was *insolvent* and there was proof of the actual cost (to general creditors) of making the collections. Here, so far as the record discloses there were assets more than sufficient to discharge the claims of all creditors in full and the only ones affected would be the stockholders of the company.

At pages 14 and 15 of his brief, respondent says:

> "The opposing brief refers to an allegation in a pleading in the underlying proceeding in which the receivers were appointed, that the assets exceed the liabilities by $13,000,000. Unfortunately this case does not offer possibility of paying general creditors in full. There was adjudication in bankruptcy March 10, 1934." (R. 91.)

This is typical of the arguments advanced by the receivers in the District Court and in the Court of Appeals, which no doubt persuaded both courts in arriving at an erroneous conclusion. The petition for the appointment of the receivers alleges the value of the assets over and above liabilities of the company to be $13,000,000. The company, in order to immediately procure the appointment of receivers admits the averments of the bill of complaint and

joins in the prayer thereof (R. 6) which action is confirmed by the Board of Directors (R. 10). In the stipulated facts it is agreed that the company has assets of $21,415,467 (R. 65, Par. 3). The total amount of liabilities as shown by the bill of complaint is slightly over $7,000,000 (R. 3). We must assume that these verified pleadings filed by one side and agreed to by the company contain a truthful statement of the facts. The decree in this case was entered in the District Court, January 31, 1934, and the petition in bankruptcy under which respondent was appointed trustee was not filed until February 18, 1934, so that when this case was tried and all of the facts were before the District Court there was no adjudication in bankruptcy and for all that appears from the record the company was amply solvent, and the business was being conducted by the operating receivers. The stipulation filed in the Circuit Court of Appeals, April 27, 1934, the day when the oral argument was heard, discloses that on February 18, 1934 a petition in bankruptcy was filed and the adjudication was made March 10, 1934. We insist that so far as this record is concerned, it discloses affirmatively that the Grigsby-Grunow Company is amply solvent and able to respond to the full amount of petitioner's claim. Aside from that, however, the receivers collected over $350,000 on accounts assigned to the intervening petitioner (R. 45, Par. 22) and whether the company was insolvent or not, is not the issue. There was sufficient collections on accounts assigned out of which petitioner could have been paid the full amount of its advances, its compensation and reasonable attorney's fees. The argument now made that "unfortunately this case does not offer the possibility of paying general creditors in full," is entirely outside of the record.

Courts Do Not Favor Provisions of a Contract Creating a Penalty, Particularly When That Penalty Is Directed not Toward the Party to the Contract but Toward the Assets of an Estate in Receivership or Bankruptcy.

Under this point, which we think is inapplicable, counsel cite *Kothe, Trustee* v. *R. C. Taylor Trust,* 280 U. S. 224. There a lease contained a provision fixing damages payable *only* out of the assets of a bankrupt estate. This court said (p. 226):

> "The courts are 'strongly inclined to allow parties to make their own contracts, and to carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained* * *. The question always is, what did the parties intend by the language used? When such intention is ascertained it is ordinarily the duty of the court to carry it out.'"

There is a distinction between interest accruing by virtue of the terms of a contract and interest awarded by way of damages for a breach of the contract, although the recovery is frequently spoken of as a recovery of interest. 17 C. J. 813.

In *Buckingham* v. *Orr,* 6 Colo. 587, the defendant executed notes bearing interest at the rate of 2 per cent per month until due and, if not paid when due, to bear interest at 3 per cent a month until paid.

The court said, at page 591:

> "We have no statute on the subject of usury, and a party may contract for and collect whatever rate of interest he chooses, provided such interest be intended as compensation for the use of the money."

And at page 592, the court said:

> "We must say that the rate specified in these notes was *prima facie* sufficient to establish the measure of

damages for breach of the contract. No evidence of any kind was offered to overcome this *prima facie* showing, and the court should have accepted the measure of damages thus established."

In *Reeves* v. *Stipp*, 91 Ill. 609, a promissory note provided for payment of 10 per cent interest from date if not paid when due and the court said, at page 610:

"The defense insisted upon is, that the interest reserved in the note from the date thereof, unless paid at maturity, is a penalty, and as the maker died before the note matured, it is contended the estate, equitably, ought not to be held for it. The fallacy of the position taken lies in the assumption, that the rate of interest reserved from the date of the note, which was evidently intended to secure prompt payment, is penalty and not liquidated damages. Whether the sum named in an agreement to secure performance will be treated as liquidated damages or as a penalty, is often a question of much difficulty, but the authorities are to the effect it must be determined in accordance with the intention of the contracting parties, when that can be ascertained. *Gobble* v. *Linder*, 76 Ill. 157. It is very clear the parties in this case intended the interest reserved should be the measure of damages in case the note was not paid when due. The parties call it neither penalty nor liquidated damages, but that is a matter of no consequence. It is simply a rate of interest which is lawful by contract under our statute from the date of the note, inserted with a view to secure prompt payment. It is a contract the maker could lawfully make, and if living it could be enforced against him as valid and binding in law. It is not understood how the death of the maker of the note can render void his contract understandingly and fairly entered into. The intestate chose to make his contract in this form, and no reason exists why it should not be enforced as he made it. It may be well understood, from the contract itself, that the damages for nonpayment of the principal of the note at maturity have been the subject of calcula-

tion and adjustment, and the amount definitely agreed upon by the rate of interest fixed from the date of the note.

"It is said, that because of the death of the maker he could not pay the note so as to avoid the interest from date. Were that a valid objection, it might be urged with equal propriety against paying interest on any interest bearing obligations after maturity in case of death of the makers—a proposition that finds no sanction either in reason or authority."

Funds in Custodia Legis and Not Held for Unreasonable Periods Do Not Ordinarily Bear Interest Unless Interest Is Earned Upon Such Funds.

We find, upon referring to the authorities cited in support of this point, that none support the contention of respondent. In *Thomas* v. *Western Car Co.*, 149 U. S. 95, the question was whether to allow several portions of a claim for rental and repair of cars to a railroad company before and during receivership. The facts are so entirely different, however, as to hardly admit of any analogy.

In *American Iron and Steel Manufacturing Co.* v. *Seaboard Air Line Railway*, 233 U. S. 261, the *Thomas* case was distinguished and not followed, and this court, at page 267 said:

"For, manifestly, the law does not contemplate that either the debtor or the trustees, can, by securing the appointment of Receiver, stop the running of interest on claims of the highest dignity."

We do not believe that either *Chemical National Bank* v. *Armstrong*, 59 Fed. 372, or *Richardson* v. *Louisville Banking Co.*, 94 Fed. 442, are applicable, inasmuch as the United States statutes provided that assets of insolvent national banks, when converted into money by the receivers must be paid to the United States Treasury, for distribution to creditors by the Comptroller of

the Currency, whereas in the instant case there was no statutory requirement that the receivers hold the funds collected by them or pay them over to any governmental department or official.

In *Sexton, Trustee* v. *Dreyfus,* 219 U. S. 339, this court held that a secured creditor of a bankrupt may apply interest and dividends accruing on securities after the date of the petition to interest on the debt accruing after such date in the event he is able to realize sufficient on his security so to do, although in the event the securities are not ample to pay the debt, he cannot apply the proceeds of the securities to the payment of interest after the date of the petition in bankruptcy.

The *Sexton* case also was considered in *In re: Gotham Can Company,* 48 Fed. (2d) 540, where a contract similar to the instant one is involved, and its inapplicability is there fully stated.

We submit that the funds in the hands of these operating receivers cannot be considered *in custodia legis.*

Denial by Equity of the Relief Prayed.

Under this point respondent contends that because the intervening petition prayed that *money* be paid to petitioner, it was seeking equitable relief. No mention whatever is made of the policy of the Illinois law as determined from its statutes and the decisions of its Supreme Court. Likewise, respondent fails to comment on the numerous decisions cited, which hold that such statutes and decisions of the Illinois courts are binding on Federal courts of equity sitting within Illinois. In support of this point respondent cites numerous cases, the first of which is *National Fire Insurance Co.* v. *Thompson,* 281 U. S. 331, cited by the Court of Appeals in the instant decision. In that case the insurance company not only entered into a stipulation to do certain things which it failed to do, thereby

precluding the courts from determining the issues of fact involved, but charged premiums in violation of the stipulation and orders entered pursuant thereto, and this court held that the lower court could withhold relief until the company kept its promises. In the instant case, petitioner violated no stipulation or order of court.

In *Miss. & Mo. R. R. v. Cromwell,* 91 U. S. 643, under a judgment and execution against a county, the marshall assumed to levy on 1,740 shares of capital stock, in a railroad company, belonging to the county and sold the same to appellee for $50, after a decree was entered in other proceedings in favor of the judgment creditor and other creditors, which decree held said stock, deposited in the foreclosure proceedings brought against the railroad company, should be held by the depositary for the benefit of the creditors of the county, including the judgment creditor. This court said, in reversing the Circuit Court:

> "If by payment of the county bonds, or in any other way, the 16 per cent becomes liberated from the decree, the county will be equitably entitled to the money, unless Cromwell, the appellee, has a better equity. To him it will be a windfall, like a prize in a lottery. He paid no adequate consideration to entitle him to claim it as a matter of equity. If the law gives it to him, he should seek his remedy at law. Equity will not lend its aid to any such games of hazard.* * * He comes into court with a very bad grace when he asks to use its extraordinary powers to put him in possession of thirty thousand dollars worth of stock for which he paid only fifty dollars. The court is not bound to shut its eyes to the evident character of the transaction."

This court then went on to say that which is quoted by respondent. There is no analogy between that case and the instant case.

In *Cragin* v. *Powell,* 128 U. S. 691, it was held that one who acquires land, knowing that it covers a portion of a

tract claimed by another, will be held either not to mean to acquire the tract of the other, or will be considered to be watching for accidental mistakes of others and preparing to take advantage of them, and as such not entitled to receive aid from a court of equity. The facts in that case were that a surveyor thought he discovered an error in public lands and induced appellee's grantor to obtain a patent from the state of Louisiana, when the appellee knew that the tracts to which he was laying claim had been possessed and cultivated by appellant for a long period of years.

In *Deweese* v. *Reinhard*, 165 U. S. 386, it was held that plaintiff was an intruder on lands conveyed by the United States to the State of Nebraska and declined to assent to plaintiff's contention that, because he did not have a legal title, a court of equity must enforce and establish his right; plaintiff attempting to establish a right in himself to the land, notwithstanding the grants were all a matter of record.

In *Randolph* v. *Quidnick Co.*, 135 U. S. 457, Randolph purchased at an execution sale stock worth over a half million dollars for the sum of $275, which execution sale was ten years subsequent to the transfer of said stock by the judgment debtor to trustees for the benefit of creditors, Randolph having been one of the creditors and having knowledge of the assignments. This court said, page 460:

> "The purchase was purely speculative. If the transfers theretofore made by the Spragues for the benefit of their creditors are sustained, the purchaser takes nothing. If they are not to be sustained they fail *in toto,* and the entire value of the property belongs to this purchaser. So his purchase is one simply to speculate upon the chances of successfully attacking transfers of large property, made for the benefit of creditors, and with the view of depriving them of the benefits of such transfers. It is a case where

equity, true to its ideas of substantial justice, refuses to be bound by the letter of legal procedure, or to lend its aid to a mere speculative purchase which threatens injury and ruin to a large body of honest creditors, who have trusted for payment of their debts to the legal validity of proceedings theretofore taken."

In *Jenkins* v. *Greenebaum, et al.,* 95 Ill. 11, the defense of usury was asserted by an individual. There is no question but that under the Illinois law an individual may claim usury either at law or in equity.

Higgins v. *Lansingh,* 154 Ill. 301, involved questions of fraud in the making of a contract, and one or more of the directors voting to make the contract on behalf of the corporation had a personal interest therein, which, of course, is not the case here, and therefore not in point.

CONCLUSION.

The contract in the instant case was entered into between two large corporations, dealing at arm's length. Petitioner on its part agreed to perform certain services and advance large amounts of money. It did both. The company agreed that for the advance of such moneys and the rendition of services it would pay petitioner a stipulated rate of compensation. Petitioner permitted the company to collect the assigned accounts receivable, provided remittances in kind were made each day. Both parties lived up to the contract until a creditor filed a petition for the appointment of a receiver. The day following such appointment the company answered, admitted the allegations of the petition and consented to the appointment of receivers. The receivers were appointed and qualified the same day. One of the receivers was the vice president of the company and the other counsel for respondent. From their actions, as shown by

the record, they were thoroughly familiar with all of the affairs of the company, and on the day following their appointment filed a petition and procured the District Court to enter an order, under which they would not have performed the company's obligations under the contract. That this order which was entered without notice would have been very harmful to petitioner is almost conceded, and in a burst of generosity the receivers offered to recognize whatever loss petitioner sustained as a general unsecured claim. This scheme of the receivers was detected and petitioner retained counsel to protect its rights, and upon the filing of the intervening petition the receivers continued to collect all funds on such assigned accounts and refused to turn any part of it over, without an order of court.

The receivers then induced the District Court to enter an order permitting them to spend $35,000 in an advertising campaign, and they are now seeking contribution for such expenditure from this petitioner.

It is respectfully insisted that petitioner was acting entirely within its legal rights. That it sought no unfair advantage over the receivers, but was merely seeking to enforce its contract. The fact that the matter was pending in a court of equity, should not deprive petitioner of its legal rights.

Exactly the same contract and the same issues were before the court in *Ramsey, et al.* v. *Marlin Firearms Corporation,* 14 Fed. (2d) 314, wherein the court said:

> "It is not the province of the court to determine whether this contract was onerous or fair in its provisions. It is sufficient that it was entered into, and all we are here permitted is to determine the exact obligation of each party to it. One twenty-fifth of 1 per cent. per diem, computed, not upon the amount advanced, but upon the total face amount of the outstanding accounts, probably was equal to interest at the rate of over 20 per cent., but the parties solemnly

agreed to this arrangement. No question of usury has been raised here, so there is no option left to the court, except to enforce the arrangement, unless some principle of law bars such enforcement."

The answers of the receivers set forth no defense and the court should have stricken the answers from the file and entered a decree in favor of the petitioner.

The decision of the 7th Circuit in the Chicago Reed & Furniture Company case and the decision in the instant case by the Court of Appeals are wholly without foundation in point of law, and should be reversed.

Respectfully submitted,

EDWARD ROTHBART,
NORMAN M. PETERSON,
JULIUS M. ROSENFIELD,
SAMUEL A. DEW,
Counsel for Petitioner.

FILE COPY

FEB 28 1935

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934

No. 522

MANUFACTURERS' FINANCE COMPANY,
Petitioner,

vs.

FRANK M. McKEY, as Trustee in Bankruptcy
of GRIGSBY-GRUNOW COMPANY,
Respondent.

ANSWER TO MOTION BY RESPONDENT FOR LEAVE TO PRESENT TO THE COURT A STATEMENT ALTERING ANSWER TO A QUESTION DIRECTED BY THE COURT TO COUNSEL FOR RESPONDENT DURING THE ORAL ARGUMENT, FEBRUARY 14, 1935.

EDWARD ROTHBART,
One N. LaSalle Street,
Chicago, Illinois,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934

No. 522

MANUFACTURERS' FINANCE COMPANY,
Petitioner,

vs.

FRANK M. McKEY, as Trustee in Bankruptcy
of GRIGSBY-GRUNOW COMPANY,
Respondent.

ANSWER TO MOTION BY RESPONDENT FOR LEAVE TO PRESENT TO THE COURT A STATEMENT ALTERING ANSWER TO A QUESTION DIRECTED BY THE COURT TO COUNSEL FOR RESPONDENT DURING THE ORAL ARGUMENT, FEBRUARY 14, 1935.

On oral argument, counsel for respondent was asked whether petitioner could have maintained an action at law for money had and received, against the receivers, and the question was answered in the affirmative. Several days after the oral argument was made counsel moved for leave to explain his answer.

In the written explanation respondent takes the position that on the day when the intervening petition was filed,

November 29, 1933, the receivers had, up to then, received an *inconsequential* sum of money from the assigned accounts and Record 14, lines 2 to 6, is cited to sustain this position. We submit that the record cited comes from a witness for the receivers who merely was called to justify an expenditure of $35,000.00 by the receivers for advertising and his testimony relating to collections is very general.

The amended stipulation of facts (R. 63, 64) reveals that the day following the appointment of the receivers a conference was had between the petitioner and counsel for respondent, at the time of which conference the receivers had collected $50,000.00 in cash on accounts receivable assigned to petitioner, and on the very day of the conference the receivers' representative was in Detroit endeavoring to collect an account of $100,000.00 from the Ford Motor Company which was assigned to petitioner, *and was then due.* It is not clear from the record whether the $100,000.00 was collected from the Ford Motor Company before the intervening petition was filed, but it is admitted that $50,000.00 had then been collected, which the receivers refused to turn over to petitioners. Evidently the parties expected that the $100,000.00 would be collected promptly and the record discloses that petitioner's counsel stated to the receivers that he would recommend to his client that if the receivers paid over the $50,000.00 on hand and the $100,000.00 to be collected immediately from the Ford Motor Company, that he (petitioner's counsel) would recommend that such payment be accepted and short term receivers' certificates be taken for the balance due intervening petitioner, which proposition the receivers refused to accept (R. 64). Three or four days later the intervening petition was filed (R. 13).

Theoretically, a remedy at law existed. In order to put this theory into practice, however, it would have been necessary to

(*a*) Procure the District Court to vacate the injunction restraining all persons from interfering with said receivers in possession of said property and in the administration of their trust and in the performance of their duties (R. 9).

(*b*) Obtain permission to sue the receivers at law.

(*c*) Notify debtors of the assignment of the accounts to petitioner, thereby incurring considerable expense, and possibly delaying the ultimate collection of the accounts.

To circumvent the possibility of petitioner overcoming these objections, the record discloses that the day following their appointment the receivers filed a petition in the District Court wherein they set forth under oath that under the terms of the contract in effect between petitioner and the Grigsby-Grunow Company, petitioners have the right to notify debtors under said accounts receivable, which debtors are distributors and dealers and said finance companies have the further right to send their representatives to the offices of the defendant corporation, at the expense of the defendant corporation, to check moneys received by the defendant corporation on said accounts receivable; that if said finance companies notified the debtors under said accounts receivable, so assigned, great loss would inure to the good will of the defendant corporation, or if said finance companies sent representatives to the offices of the defendant corporation to check up said accounts receivable, a large expense would be entailed by the defendant corporation (R. 11). The receivers prayed for an order authorizing them to turn over and deliver to petitioner such funds as may be received by the receivers from time to time upon accounts receivable owing to the defendant corporation which had theretofore been assigned to petitioner (R. 11). Thereupon the District Court

entered an order in accordance with the prayer of that petition (R. 12). On the trial petitioner called counsel for respondent (who was one of the receivers) as its witness (R. 27) and he testified that he did not know whether the foregoing order was entered or not, and concluded that if it was entered, it was never acted upon. Obviously, the attitude of the receivers toward the rights of petitioner and as to the effect of the contract has materially changed since this matter was tried in the District Court.

Respondent quotes from the intervening petition and contends that petitioner sought in advance of receipt by the receivers of moneys from assigned accounts, to obtain a decree to impress a trust on such funds. There are two prayers to the intervening petition, the second being the only one quoted by respondent. The first one, appearing at the bottom of page 15 of the record, says:

> "Wherefore, your petitioner prays that an order may be entered herein finding the title to the accounts so assigned to be vested in your petitioner and that your petitioner has the right, power, authority and duty to retain and keep said accounts so assigned, and may collect and enforce the collection of same, using all proper diligence, until the unpaid balance due to your petitioner, to be determined by this court, plus its service charges, attorney's fees, costs and expenses, as is provided in said contract, shall be paid and reimbursed to your petitioner."

Clearly, the petitioner was asking for an adjudication by the District Court holding that petitioner has the right and power to retain and keep the collections on the accounts so assigned until the unpaid balance due it has been paid in full.

If the respondent believed that petitioner possessed the theoretical remedies now suggested by him, some mention of these remedies would have been made in the answer and

the amendment to the answer filed by the receivers. But an examination of the answers disclose that the only defenses suggested were to the effect (R. 18) that in an effort to protect the entire amount of accounts receivable, including those assigned to petitioner, the receivers undertook to spend a large sum in advertising and other things which redounded to the benefit of the petitioner and that the contract involves merely a loan of money to the Grigsby-Grunow Company and that "no notice having been given to debtors of accounts, the barring order heretofore in this proceedings entered restrains said intervening petitioner from giving any notice upon such contracts; that the receivers can see no justification for equitable charge against them upon balances owing as of the date of receivership of an interest rate in excess of seven per cent."

What probably bothered the receivers was that if notice of the assignment of these accounts was given to the various debtors, who at that time by reason of the receivership of the Grigsby-Grunow Company were extremely worried, it would interfere with the good will of the company (R. 60). They were disturbed concerning the preservation of the *free* accounts and the equity in the pledged accounts and therefore urged the court to permit an expenditure of $35,000.00 for advertising, as recited in their petition (R. 56-60). A similar contention was made by the receiver in the matter of Lutz & Schramm, 38 A. B. R. 351, and there the court stated:

> "The collection of the accounts by them (receivers) was for the benefit of the bankrupt estate so as not to interfere with the preservation of the good will."

Respectfully submitted,

EDWARD ROTHBART,
1 N. LaSalle Street,
Chicago, Illinois,
Counsel for Petitioner.

FILE COPY

Office Supreme Court,
FILED
NOV 24
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 522

MANUFACTURERS' FINANCE COMPANY,
Petitioner,

vs.

FRANK M. McKEY, AS TRUSTEE IN BANKRUPTCY OF GRIGSBY-GRUNOW COMPANY,
Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

THOMAS L. MARSHALL,
134 South La Salle Street,
Chicago, Illinois,
Counsel for Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

TABLE OF AUTHORITIES.

	PAGE
Home Bond Co. v. McChesney, 239 U. S. 568	8
In Re International Raw Materials Corporation, 22 F. (2d) 920 (C. C. A. 2)	7
In Re Chicago Reed & Furniture Co., 7 F. (2d) 885 (C. C. A. 7)	8
La Sueur v. Manufacturers' Finance Co., 285 Fed. 490 (C. C. A. 6)	8
Merchants & Manufacturers Securities Company v. Johnson, 69 F. (2d) 940 (C. C. A. 8)	7
National Discount Co. v. Evans, 272 Fed. 570 (C. C. A. 6)	8
National Fire Insurance Co. v. Thompson, 281 U. S. 331	7
Tennant v. Joerns, 329 Ill. 34	4

Pomeroy's Equity Jurisprudence (4th ed.) Vol. I, Sec. 397	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 522.

MANUFACTURERS' FINANCE COMPANY,
Petitioner,

vs.

FRANK M. McKEY, AS TRUSTEE IN BANKRUPTCY OF GRIGSBY-GRUNOW COMPANY,
Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

Grigsby-Grunow Company was adjudicated bankrupt March 10, 1934.

When the receivers in equity were appointed for that company on November 24, 1933, the company owed to the petitioner the amount of prior loans and interest thereon at the rate of 20 per cent, in the aggregate of $269,700.78. (Rec., 45.)

Petitioner held as security $550,000 of assigned trade acceptances and assigned accounts receivable. Upon

the assignment of the accounts receivable, notices had not been given to the debtors, and such notices were not at any time given, so that the checks in payment of the assigned accounts were received by the receivers, as such checks had been received by the company prior to the receivership. The receivers borrowed no money from the petitioner. The controversy relates only to the manner in which the receivers liquidated petitioner's secured claim and freed the security.

The receivers deposited all collections upon such assigned accounts in a special account, and with appropriate court orders paid $186,162.48 to the petitioner in three installments between November 24, 1933 and December 29, 1933. This sum of $186,162.48, together with petitioner's realization prior to December 29, 1933 upon the assigned trade acceptances, paid in full the amount of $269,700.78 owed at the date of appointment of the receivers. (Rec., 44, 45.)

The receivers consented to payment to the petitioner of interest from November 24, 1933, to December 29, 1933, at the rate of 7 per cent. (Rec., 74.) The petitioner claimed in the equity proceeding interest from the date of receivership at varying rates from 20 per cent to 250 per cent, averaging 28⅔ per cent for the period. (Rec., 73, 74.) Petitioner further claimed $7,800 as attorneys' fees. (Rec., 70.) The precise difference between the receivers and the petitioner was: $3,096.22 as to interest, and $7,800 as to attorneys' fees.

The basis of the claim for interest at rates varying from 20 per cent to 250 per cent, and averaging 28⅔ per cent, was as follows. A complicated contract had been entered into between the petitioner and Grigsby-Grunow Company under which advances in varying amounts had been made, the balance of which together with 20 per cent interest, amounted at the inception of the receivership to $269,700.78.

Under the provisions of this contract, interest was computed *not upon the amount of the outstanding balances of advances but upon the face amount of trade acceptances and accounts receivable assigned.* The statement by us and by our opponents that this interest was at the rate of 20 per cent upon the outstanding balance of advances was correct, because the security so pledged was maintained at approximately twice the amount of outstanding balances of advances, and settlements between the petitioner and the company were always upon the basis of 20 per cent interest upon outstanding balances. (Rec., 63.) When checks were received by the company, the checks had been taken by the company to the petitioner and half of the amount thereof were forthwith returned to the company, the security thereby being maintained at twice the outstanding balance of advances and the interest being always 20 per cent upon outstanding advances.

When, however, the receivers were appointed, the petitioner claimed the right to receive *full* collections upon the assigned trade acceptances and accounts receivable, and retained as security all of the remaining trade acceptances and accounts originally assigned. Petitioner also claimed the right to compute interest solely upon the face amount of the entire security remaining, notwithstanding the fact that the applications of money between November 24, 1933 and December 29, 1933 gradually extinguished, and on the latter date completely extinguished, the principal of the debt. This resulted in a sharp and, as we contend, an arbitrary increase in the rate of interest, so that upon the last balance of principal, according to their claim, the rate of interest actually reached 250 per cent, the average from November 24, 1933 to December 29, 1933 being $28\frac{2}{3}$ per cent. (Rec., 65, 95.)

The petitioner not only asserted in equity this ex-

traordinary claim but also asserted a claim for $7,800 attorneys' fees alleged to have been incurred in such assertion of claim.

The claim was shocking to a court of equity for three reasons:

1. It evidenced an assertion of, and an insistence upon, a contract claim upon a basis more onerous than the petitioner had asserted against the company itself, and in excess of its profits under its contract as the petitioner and the company had themselves operated under that contract.

2. It evidenced an assertion of, and an insistence upon, a claim for attorneys' fees in the amount of $7,800, whereas the total amount in dispute was $3,096.22.

3. It evidenced an assertion of, and an insistence upon, such claims to the disadvantage of other creditors, though the chancellor found that the work of the receivers and an expenditure by them of $35,000 in merchandise advertising, contributed substantially to the liquidity of the assigned accounts, a considerable portion of which were owed by persons who had purchased the merchandise for resale at wholesale or retail with contemplation of company advertising.

Petitioner asserts that the two courts below have denied that in Illinois a corporation may contract for payment of interest in excess of the statutory rate. Neither court so held. The case of *Tennant* v. *Joerns*, 329 Ill. 34 is not questioned.

The finding by the chancellor was that the petitioner did not do equity and did not offer to do equity. The finding was amply justified.

As evidence of what was decided by the District

Court and by the Circuit Court of Appeals we quote from the two opinions.

The District Court opinion (Rec., 71):

"It may be conceded that the foregoing propositions are correct statements of rules of law applicable in proper cases. In the court's opinion, they are not applicable here. The intervening petitioner has lost sight of one of the fundamental maxims of equity, namely, He who comes into equity must come with clean hands, or, expressed in another form, He that hath committed iniquity shall not have equity. In this case, and so far as the opportunities of this court for observation has extended in other cases, loan companies which make their loans by means of the method of purchasing accounts, uniformly refrain from giving notice, prior to receivership or bankruptcy, to the debtors of the assignment. It is said that they so refrain because if they did not so refrain they would alienate all of their customers; and, so far as the court's observation has extended, they refrain from giving notice to debtors of the assignment after receivership or after bankruptcy for the reason, as has been said, that the debtors are more likely to pay if they remain in ignorance of the assignment. As has been indicated in the case at bar, as regards the large majority of the assigned accounts, the intervening petitioner did not give notice to the debtors either before or after the appointment of receivers. The receivers have in this case gone to extraordinary efforts to maintain the integrity of the business of the defendant and to preserve the accounts receivable, including the pledged accounts, as live assets. Among other things, the receivers have expended the sum of approximately $35,000 in an advertising campaign, one of the principal purposes of which was to maintain the good will of the defendant and to preserve the receivables of the defendant as live and valuable assets. The intervening petitioner has had the benefit of the services of this court of equity. It is said that the court restrained the intervening petitioner from giving notice of the assignment of the accounts. The court observes that no motion has at any time been made to vacate that restraining order. The fact is

that the intervening petitioner, because it refrained from giving notice of the assignment of the pledged accounts, was compelled to and did seek and accept the good offices of this court of equity in and about the collection of the pledged accounts. * * *

It is inconceivable that a court of conscience should be compelled to do the unconscionable thing of paying twenty eight per cent interest per annum. Perhaps the court should say further, concerning the claim for attorney's fees, that the court cannot see any reason for the intervening petitioner having obligated itself for attorney's fees in any considerable amount. There has never been any doubt at any time but that, to the extent that the proceeds of the pledged accounts would become available, the principal of intervening petitioner's debt and contract interest thereon to the date of the appointment of the receivers, and legal interest thereon thereafter would be paid."

The Circuit Court of Appeals opinion, 72 F. (2d) 471, 473:

"If this case arose in an action at law between the original parties it may well be that the court could not refuse to enforce the contract according to its strictest terms. But where the creditor goes beyond the practice of the parties under the original contract and tries to enforce rights never asserted against the other contracting party, and in addition tries to collect counsel fees exceeding 177 per cent of the maximum amount claimed against the receiver who is attempting to salvage the assets for the benefit of the other creditors who have a substantial interest in the estate of the debtor, we can not feel that a court of equity is any place for him to press his demands. As stated in *National Fire Insurance Co.* v. *Thompson*, 281 U. S. 331, 50 S. Ct. 288, 291, 74 L. Ed. 881, 'Courts of equity frequently decline to interfere on behalf of a complainant whose attitude is unconscientious in respect of the matter concerning which it seeks relief.'"

The foregoing opinions are amply supported by authorities.

Courts of equity frequently decline to interfere on behalf of a complainant whose attitude is unconscientious in respect of the matter concerning which it seeks relief.

National Fire Insurance Co. v. *Thompson*, 281 U. S. 331.

Pomeroy's Equity Jurisprudence (4th ed.), Vol. I, Sec. 397.

If a court of equity is compelled to submit to an assertion, under such an equivocal contract, of a claim for interest after the date of receivership averaging 28⅝ per cent and running as high as 250 per cent, contrary to the parties' own operations under the contract, then the principle enunciated above has little meaning.

The cases cited by the petitioner, *In Re International Raw Materials Corporation*, 22 F. (2d) 920 and *Merchants & Manufacturers Securities Company* v. *Johnson*, 69 F. (2d) 940, involve no such findings and no such facts. In those two cases, upon which petitioner relies, there was no suggestion that the complainant had changed its position or was conducting itself in an inequitable manner.

Indeed, the case of *Merchants & Manufacturers Securities Company* v. *Johnson*, 69 F. (2d) 940, (C. C. A. 8, 1934) allowed contract interest to the date of receivership precisely as was allowed in the present case, and allowed only 6 per cent interest (p. 946) after the date of the receivership, whereas in the present case the petitioner was allowed 7 per cent interest after the date of the receivership. The Circuit Court of Appeals for the Second Circuit, *In Re International Raw Materials Corporation*, 22 F. (2d) 920, does not appear to have made any allowance of interest different from the allowance in the present case and in the Merchants and Manufacturers Securities Company case, and it does not appear from the

opinion that the contention here made by petitioner was there even raised or considered.

In the following cases, persons who sought equitable relief under facts somewhat analogous to the facts of the present record, were considered under the particular facts of such cases to be guilty of overreaching:

In re Chicago Reed & Furniture Co., 7 F. (2d) 885, (C. C. A. 7, 1925).

La Sueur v. *Manufacturers' Finance Co.*, 285 Fed. 490, 500 (C. C. A. 6, 1922).

That the contract is not a contract for services but merely a secured contract for lending money, as found by the courts below, is well settled.

Home Bond Co. v. *McChesney*, 239 U. S. 568.

National Discount Co. v. *Evans*, 272 Fed. 570 (C. C. A. 6, 1921).

La Sueur v. *Manufacturers' Finance Co.*, 285 Fed. 490 (C. C. A. 6, 1922).

Wherefore, it is respectfully submitted that this record presents no conflict whatever between different circuit courts of appeals, and presents ordinary application of principles of equity and particularly the application of the principle that one who seeks equity must do equity. The findings are supported by the evidence, and the findings support the decree. The decree is fair and equitable.

Respectfully submitted,

THOMAS L. MARSHALL,
134 South La Salle Street,
Chicago, Illinois,
Counsel for Respondent.

FR

LE COPY

Supreme Court
D
DEC 19
IR
LE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 522

MANUFACTURERS' FINANCE COMPANY,
Petitioner,

vs.

ANK M. McKEY, AS TRUSTEE IN BANKRUPTCY OF GRIGSBY-GRUNOW COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

THOMAS L. MARSHALL,
134 South La Salle Street,
Chicago,
Counsel for Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

	Page
The Issue Involved	1-3
Further Statement of the Case	4-9
The average rate of 28-3/10 per cent per annum	4-5
The fund created by the receivers	6-7
Delays in payment inherent in receivership administration	7-8
Attorneys' fees	8-9
Argument	10-19
The purported conflict between circuits	10-12
The position of the finance company is that it can place upon the receivers the large expense of conservation and collection of the accounts and, without contribution thereto, can in equity even charge the receivers 28-3/10 per cent interest for the period during which the receivers were creating the fund to pay the finance company	13-15
Courts do not favor provisions of a contract creating a penalty, particularly when that penalty is directed not toward the party to the contract but toward the assets of an estate in receivership or bankruptcy	15
Funds in custodia legis and not held for unreasonable periods do not ordinarily bear interest unless interest is earned upon such funds	16
Denial by equity of the relief prayed. "He who seeks equity must do equity"	16-19

Table of Cases.

American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry., 233 U. S. 261 ..... 15, 16
American Pig Iron Storage Warrant Co. v. German, 126 Ala. 194, 28 So. 603 14
Bowman v. Neely, 137 Ill. 443 19
Bowman, admr. v. Neely, 151 Ill. 37 19
Cannon v. Snipes, 32 Wash. 243, 73 Pac. 379 14
Central Trust Co. v. Chester County Electric Co., 9 Del. Ch. 247, 80 Atl. 801 14
Chemical National Bank v. Armstrong, 59 Fed. 372 16
Commercial Security Co. v. Holcombe, 262 Fed. 657 2
Cragin v. Powell, 128 U. S. 691 18
Cutting v. How, 8 Mass. 257 18
Deweese v. Reinhard, 165 U. S. 386 .....
Dorothy v. Commonwealth Co., 278 Ill. 629 2
Fagan Iron Works v. Calumet Construction Co., 82 N. J. E. 345, 88 Atl. 1069 14
General Motors Acceptance Corporation v. Mid-West Chevrolet Co., 66 F. (2d) 1 2
Glos v. Stuckart, 277 Ill. 346 18
Higgins v. Lansingh, 154 Ill. 301 18
Home Bond Co. v. McChesney, 239 U. S. 568 2
In re Chicago Reed & Furniture Co., 7 F. (2d) 885 ..... 11, 18
In re Gotham Can Co., 48 F. (2d) 540 11
In re International Raw Material Corporation, 22 F. (2d) 920 11
Jenkins v. Greenbaum, 95 Ill. 11 18
Kothe, Trustee v. R. C. Taylor Trust, 280 U. S. 224 15
LeSueur v. Manufacturers' Finance Co., 285 Fed. 490 ..... 2, 12, 14

Mercantile Trust Co. v. Kastor, 273 Ill. 332 2
Merchants & Manufacturers Securities Co. v. Johnson, 69 F. (2d) 940 10
Miss. & Mo. R. R. v. Cromwell, 91 U. S. 643 18
National Discount Co. v. Evans, 272 Fed. 570 2
National Fire Insurance Co. v. Thompson, 281 U. S. 331 17
National Trust & Credit Co. v. F. H. Orcutt & Son Co., 259 Fed. 830 2
Pennsylvania Co. for Ins. on Lives v. Jacksonville, etc. R. Co., 66 Fed. 421 14
Preston Nat. Bank of Detroit v. Emerson, 102 Mich. 462, 60 N. W. 981 13
Randolph's Administrator v. Quidnick Co., 135 U. S. 457 18
Richardson v. Louisville Banking Co., 94 Fed. 442 16
Sexton v. Dreyfus, 219 U. S. 339 16
Tennessee Finance Co. v. Thompson, 278 Fed. 597 2
Thomas v. Western Car Company, 149 U. S. 95 16
Van Benschooten v. Lawson, 6 Johns. Ch. (N. Y.) 313 18
Williams v. Dutton, 184 Ill. 608 18
Winslow v. Noble, 101 Ill. 194 18

Corpus Juris, Vol. 66, p. 143 18
Pomeroy's Equity Jurisprudence, 4th Ed., Vol. I, Sec. III 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 522.

MANUFACTURERS' FINANCE COMPANY,
Petitioner,

vs.

FRANK M. McKEY, AS TRUSTEE IN BANKRUPTCY OF GRIGSBY-GRUNOW COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

THE ISSUE INVOLVED.

Within 35 days from the date of receivership (R. 45) and before the present issue was tried in the District Court, the receivers paid to the finance company, from the proceeds of the assigned accounts, sums sufficient to extinguish its claim for advances to Grigsby-Grunow Company and full contract interest at the rate of 20 per cent per annum, to the date of receivership. There was never any question of the receivers' willingness to make such payments, from proceeds of the assigned accounts, and in addition to pay 7 per cent interest for the 35 days after the date of receivership. (Findings of Fact, par. 3, R. 74.)

The issue then and now is whether the receivers were obliged to pay, from the proceeds of assigned accounts,

more than 7 per cent interest for the 35 days after the date of receivership. The finance company asserted interest from date of receivership at an average rate of 28-3/10 per cent per annum. (R. 65.) The difference in money between 7 per cent and 28-3/10 per cent was $3,306.55. (R. 65.)

Upon trial of this issue, the District Court allowed 7 per cent. The court denied the claim for attorney's fees asserted in the amount of $7,800. (Findings of Fact, R. 73; Opinion, R. 70; Decree, R. 75.) The Circuit Court of Appeals affirmed the decree. (72 F. (2d) 471: R. 93.)

The theory of the finance company's claim is that it was a secured creditor,[1] and that the accounts receivable assigned were sufficient to pay the average rate of 28-3/10 per cent interest after receivership, to which average rate it contends the contract (R. 46) entitles it.

The finance company was a secured creditor in a peculiar sense. While accounts receivable had been assigned to it, the finance company at no time gave, or sought to give, notices of the assignments to the debtors of the accounts. (Findings of Fact, par. 2, R. 74; Opinion, R. 71.) The receivers had the full responsibility of conservation and collection of the accounts. In carrying out this re-

---

[1] In so stating the theory of the finance company, we should qualify by saying that its brief describes the contract in terms of a sale of accounts and not in terms of a loan with the accounts as collateral.

Such a contract in recent years has always been construed as a loan with the accounts as collateral. *Home Bond Co.* v. *McChesney*, 239 U. S. 568; *Mercantile Trust Co.* v. *Kastor*, 273 Ill. 332; *Dorothy* v. *Commonwealth Co.* 278 Ill. 629; *General Motors Acceptance Corporation* v. *Mid-West Chevrolet Co.* 66 F. (2d) 1 (C. C. A. 10, 1933), extensive note, p. 4; *Tennessee Finance Co.* v. *Thompson*, 278 Fed. 597 (C. C. A. 6, 1922); *Commercial Security Co.* v. *Holcombe*, 262 Fed. 657 (C. C. A. 5, 1920); *National Discount Co.* v. *Evans*, 272 Fed. 570 (C. C. A. 6, 1921); *LeSueur* v. *Manufacturers' Finance Co.* 285 Fed. 490 (C. C. A. 6, 1922); *National Trust & Credit Co.* v. *F. H. Orcutt & Son Co.* 259 Fed. 830 (C. C. A. 7, 1919).

Throughout the brief we refer to the transaction as a loan with collateral.

sponsibility, under the orders of court, the receivers expended considerable sums in advertising, allowances, credits, etc., and by their efforts and by such expenditures were enabled to create a fund sufficient to pay the finance company. (Findings of Fact, par. 4, R. 74; also R. 24-5, 71.) In the intervening petition, no offer was made to share in any part the expense of creation of this fund. (R. 13-16.) Instead, there is asserted claim for interest at an average rate of 28-3/10 per cent after date of receivership.

Some part of the period of 35 days was attributable to appraisal of the validity of the assignments, to audits, to notice to parties to the record and in obtaining orders of court, the money collected meanwhile reposing securely in a special bank account. (Findings of Fact, par. 3, R. 74.) Each order for payment was upon the receivers' own motion. (R. 67-8.) There was no unreasonable delay, but some delay is inherent in receivership administration.

For the period after date of the receivership the finance company demanded an interest rate, which commenced at 20 per cent and, as payments were made, arbitrarily rose in rate, until the rate actually exceeded 250 per cent, averaging for the period, 28-3/10 per cent. No such arbitrary fluctuation in rate was ever asserted against Grigsby-Grunow Company. (Findings of Fact, par. 1, R. 73-4.)

The finance company asked attorney's fees in the District Court of $7,800 (R. 29), though the maximum sum in dispute was $3,306.55. (R. 65.)

Such prayers for relief, asserted by the intervening petitioner, were considered inequitable, and the court allowed but 7 per cent interest after receivership, which had been admitted by the receivers.

These facts are so inadequately stated in the finance company's brief that we shall append a further statement of the case.

Further Statement of the Case.

The average rate of 28-3/10 per cent per annum.

We quote paragraph 1 of the Findings of Facts, to which no error is assigned:

"1. By written contract, on or about October 5, 1933, the Grigsby-Grunow Company agreed to pay to intervening petitioner for cash advances to it, interest at the rate of 10 per cent per annum, not upon the balance of cash advances remaining from time to time, but upon the aggregate amount of accounts receivable and trade acceptances assigned by the Grigsby-Grunow Company to the intervening petitioner as security for said advances. Prior to November 24, 1933, the date of the receivership, it was the practice of the Grigsby-Grunow Company and of the intervening petitioner to make adjustments from time to time so that the outstanding balances of cash advances at all times amounted to approximately one-half of the aggregate amount of accounts receivable and trade acceptances remaining assigned as security for said advances. The interest rate, therefore, prior to November 24, 1933 amounted to approximately 20 per cent per annum upon the outstanding balance of cash advances. Beginning November 24, 1933, the intervening petitioner no longer made such adjustments so as to maintain the outstanding balances of cash advances at one-half of the aggregate amount of accounts receivable and trade acceptances assigned, and applied literally the provisions of the contract which permitted the charging of interest at the rate of 10 per cent per annum upon the aggregate amount of accounts receivable and trade acceptances remaining assigned, notwithstanding the reduction from time to time in the outstanding balances of cash advances. As a result thereof, as payments were made after the receivership, the interest rate of 20 per cent, which was the effect of the provision of the contract, rose sharply so that the average interest rate, so provided, after November 24, 1933 amounted to approximately 28-3/10 per cent per annum, the interest rate for the last few days, before final payment of the principal of advances, amounting to in excess of 250 per cent per annum." (R. 73-4.)

Under orders of court, obtained upon the receivers' own motion (R. 67-8), the receivers paid to the finance company

(R. 45): $140,000 on December 14, 1933; $36,159.30 on December 22, 1933, and $10,003.18 on December 29, 1933.

The finance company itself had collected $83,538.30 upon trade acceptances which duly endorsed had been delivered to it by Grigsby-Grunow Company as additional security (R. 44-45).

$140,000
83,538.30
36,159.30
10,003.18

$269,700.78

Thus was paid to the finance company (R. 45) its total outstanding advances to Grigsby-Grunow Company, with 20 per cent interest (the contract rate) to date of receivership.

November 24, 1933 to December 14, 1933, the rate of interest asserted (related to outstanding balance of advances) was 20 per cent. December 14, 1933 to December 22, 1933, the rate asserted (related to outstanding balance of advances) rose sharply because the remaining security was more than twice the balance of advances, and interest was computed not upon balance of advances but upon face amount of security. December 22, 1933 to December 29, 1933, the rate, computable from the above figures and related to the balance of advances, to wit: $10,003.18, was approximately 290 per cent per annum. To be conservative, the final rate was stated as "over 250 per cent."

No claim for such sky-rocketing interest was made by the finance company against Grigsby-Grunow Company, the other party to the contract. (Findings of Fact, par. 1, R. 73; R. 63.)

The Fund Created by the Receivers.

We have referred to the difference between the present case and the usual case of a secured creditor, whose security is so reduced to possession as to be within his own control.

Here, the finance company at no time gave, or sought to give, notices of the assignments to the debtors of the accounts.

We quote paragraph 2 of the Findings of Fact, to which no error is assigned:

> "2. No notices to the debtors of the assigned accounts or trade acceptances were given by the intervening petitioner prior to the date of the receivership and no such notices were given subsequent to the date of the receivership, except as to a small portion of such amounts constituting part of the trade acceptances, and no application was made by intervening petitioner to give such notices, except as to such part." (R. 74.)

We further quote from the opinion of the District Court:

> "In this case, and so far as the opportunities of this court for observation has extended in other cases, loan companies which make their loans by means of the method of purchasing accounts, uniformly refrain from giving notice prior to receivership or bankruptcy, to the debtors of the assignment. It is said that they so refrain because if they did not so refrain they would alienate all of their customers; and, so far as the court's observation has extended, they refrain from giving notice to debtors of the assignment after receivership or after bankruptcy for the reason, as has been said, that the debtors are more likely to pay if they remain in ignorance of the assignment." (R. 71.)

The District Court said (R. 71): "the receivers have in this case gone to extraordinary efforts to maintain the integrity of the business of the defendant and to preserve the accounts receivable, including the pledged accounts, as live and valuable assets."

Under orders of the court, the receivers proceeded aggressively to conserve and to collect the accounts receivable.

The assigned accounts were owed largely by so-called distributors (R. 25), who purchased radios, tubes, and refrigerators and in turn sold to wholesalers and retailers. The receivership tended "to freeze" these accounts and for a week or ten days collections were small. (R. 24.) To induce the distributors to pay, to enable them to pay, and to avoid litigation over set-offs, it was necessary to assist the distributors in "moving" their merchandise, and it was necessary to reduce prices on certain items (R. 24) and to take back some merchandise. (R. 24.) To assist in "moving" their merchandise the receivers expended $35,000 in local advertising. (R. 24-5, 71, 74.) The receivers also held distributors' meetings in New York and Chicago (R. 24-25), and performed other special services particularly in connection with one of the assigned accounts which was $100,000 in amount. (R. 64.)

Few, if any, of these acts done to stimulate collections could possibly have been performed by the finance company.

Whatever, if anything, more may have been accomplished by these efforts and by this considerable expense, the receivers thereby were able to create a fund sufficient to pay off the finance company.

Delays in Payment Inherent in Receivership Administration.

From the first day of the receivership, all sums received in payment of assigned accounts were deposited in a special bank account. (Findings of Fact, par. 3, R. 74.)

The receivers had at least legal title to the money re-

ceived. It was obviously necessary for them to examine the assignments, to determine their validity, to obtain an audit of the daily transactions which preceded the receivership, to ascertain and to obtain an accounting of collections by the finance company from the trade acceptances which indeed were not mentioned in the intervening petition (R. 13-16), to give notices to parties of record and to obtain appropriate orders.

When the order of December 20, 1933 was entered, the accounting of collections upon the trade acceptances, information in the exclusive possession of the finance company, was apparently not at hand. (Order, par. 1, R. 68.)

A delay of 35 days in settling, except as to interest after receivership, this sizable claim for preference does not appear to have been unreasonable. Receivership administration rarely moves so fast.

Attorney's Fees.

The only evidence upon the claim for attorney's fees was furnished by the finance company's witness, Seymour M. Lewis, who testified that 16 days had been devoted to the matter (R. 26), and by the finance company's expert witness, Michael Gesas, who placed a value upon such services of $7,800. (R. 29.)

We quote from the Findings of Fact, paragraph 5:

> "No evidence was introduced as to the amount of reasonable attorney's fees, if any, for counsel for intervening petitioner, for services necessarily rendered herein." (R. 75.)

The court's opinion stated:

> "Perhaps the court should say further, concerning the claim for attorney's fees, that the court cannot see any reason for the intervening petitioner having obligated itself for attorney's fees in any considerable

> amount. There has never been any doubt at any time but that, to the extent that the proceeds of the pledged accounts would become available, the principal of intervening petitioner's debt and contract interest thereon to date of the appointment of the receivers and legal interest thereon thereafter, would be paid." (R. 72.)

The willingness of the receivers so to pay had at all times been made clear to the finance company. (R. 28; Findings of Fact, par. 3, R. 74.)

ARGUMENT.

The Purported Conflict Between Circuits.

Before discussing the unusual facts of the present case which led both courts below to term the demands unconscionable, we refer briefly to the decisions in the various Circuit Courts of Appeals, with reference solely to interest after date of receivership in cases involving assignments of accounts receivable.

In the present case, both the District Court and the Circuit Court of Appeals for the Seventh Circuit (72 F. (2d) 471) recognized and gave effect to the right of the finance company to its principal of advances, full contract interest to date of receivership, and 7 per cent interest thereafter until the principal was fully paid.

In *Merchants & Manufacturers Securities Co.* v. *Johnson*, 69 F. (2d) 940 (C. C. A. 8, 1934), a decision almost contemporaneous with the present Seventh Circuit case but neither case citing the other, the Circuit Court of Appeals for the Eighth Circuit reached precisely the same result. The Eighth Circuit case allowed full principal, contract interest to the date of receivership, and 6 per cent interest thereafter.

Since this identity of decision is ignored in the opposing brief, though the brief relies upon the Eighth Circuit case, we quote, from page 946, the reversal order in that case:

> "The judgment appealed from is reversed, and the cause is remanded to the lower court, with directions to enter decree in favor of the appellant for the sum of $32,489.01, with interest thereon from December 21, 1931 (the date of receivership), at the rate of 6 per cent, dismissing appellee's (the receiver's) counterclaims on the merits, and adjudging that the decree for the recovery of said amount shall constitute a special

> lien upon all of said accounts receivable still unpaid to the appellant and upon the proceeds of same in the hands of the appellee, * * *"

The result in the Eighth Circuit case was more disadvantageous to the finance company than in the present case, since the period after date of receivership in the Eighth Circuit case was almost 2½ years and completion of payment of the principal was still in the future, whereas in the present case the finance company was paid within 35 days.

A case in the Second Circuit, *In re International Raw Material Corporation*, 22 F. (2d) 920 (C. C. A. 2, 1927) is cited in support of the finance company's present contention. The opinion does not appear to discuss interest after receivership.

It is true that a later case in the Second Circuit, *In re Gotham Can Co.*, 48 F. (2d) 540 (C. C. A. 2, 1931) does allow under the facts of that case full contract interest after receivership.

In the *Gotham Can Co.* case, however, out of the total collections of $8,685.73 upon assigned accounts, $8,156.21 (being over 94 per cent of total collections) was collected by the finance company independently of the receiver and obviously after giving notices of the assignments to the debtors of the accounts. The balance of $529.52 (being less than 6 per cent of total collections) was collected by the receiver. It seems clear that the finance company assumed the burden of caring for and liquidating the accounts, and that the small residue merely came in to the receiver from debtors who did not understand or trust a notice of assignment.

Our opponents repeatedly attack the case of *In re Chicago Reed & Furniture Company*, 7 F. (2d), 885, (C. C. A. 7, 1925).

The following language in that case is pertinent to the present case, quoting from page 885 of that opinion:

> "To what extent, if at all, this has enabled corporations lawfully to bind themselves to pay interest on loans at rates beyond the theretofore statutory maximum has not to our knowledge been decided by the Illinois courts. But in our view of the case this question is not of necessity here involved. The later statute may or may not have repealed pro tanto the usury law of the state, *but it did not abrogate the rule that courts of equity will not lend their aid to enforce contracts which upon their face are so manifestly harsh and oppressive as to shock the conscience.* 39 Cyc. 891." (Italics ours.)

Since the date of that decision, the statute was construed by the Supreme Court of Illinois to provide that corporations could agree to pay interest in excess of the statutory rate, but the above italicized words of the opinion were not thereby affected.

Our opponents in their argument press that decision much fnrther than it was used in the present case, for in the present case the same court affirmed the District Court decree which had conceded the right to full contract interest prior to date of the receivership. The issue in the present case is confined to interest after receivership.

We shall discuss the above quotation further in a later subdivision of this brief.

We shall also discuss later the case of *LeSueur* v. *Manufacturers' Finance Co.*, 285 Fed. 490 (C. C. A. 6, 1922), in which the Circuit Court of Appeals for the Sixth Circuit charged the reasonable expenses of collection against a fund, collected by a creditors' committee of the borrowing corporation in liquidation of accounts assigned to the finance company.

The Position of the Finance Company Is That It Can Place Upon the Receivers the Large Expense of Conservation and Collection of the Accounts and, Without Contribution Thereto, Can in Equity Even Charge the Receivers 28-3/10 Per Cent Interest for the Period During Which the Receivers Were Creating the Fund to Pay the Finance Company.

We have stated hereinbefore the actual services rendered by the receivers and the large expense incurred in making the accounts collectible and in collecting them. These duties, which they performed under court orders, were placed upon them, so far as respects the assigned accounts, because the finance company at no time gave, or sought to give, notices of the assignments to the debtors of the accounts. The finance company was powerless, by action through collection agencies or otherwise, to accomplish with the distributors what the operating receivers were able to accomplish. The court in its opinion clearly recognized this situation. (R. 71.) See also the prayer of intervening petition. (R. 16.)

The fund in the special bank account was created by the receivers unassisted. Perhaps it was unjust to the general creditors to go so far as the receivers went. Certainly it would be unjust to the general creditors to recognize the propriety of a payment of 28-3/10 per cent interest, after this expense of conservation and collection of the assigned accounts.

In *Preston Nat. Bank of Detroit* v. *Emerson, et al.*, 102 Mich. 462, 60 N. W. 981 (1894), receivers of the corporation were called upon to collect accounts which had been assigned by the corporation as security. The decree of the trial court, denying that the fund could be impinged upon for receivers' expense, was reversed by the Supreme Court of Michigan with the following comment (N. W. page 983):

"The expense incurred in collecting has been done

> under the express decree of this court, and it is inequitable that the receivers should go without compensation, or that they should be paid out of funds which should go to unsecured creditors."

In *LeSueur* v. *Manufacturers Finance Co.* 285 Fed. 490 (C. C. A. 6, 1922), the present petitioner was confronted with a liquidation of its assigned accounts. There, as here, it did not assume the burden of conservation and liquidation of the accounts but permitted a liquidating committee to be formed for the distressed corporation, which endeavored to collect the assigned accounts and was partially successful. A substantial sum was deducted by order of court from the proceeds of the pledged accounts to represent the cost of collections. We quote from the opinion (p. 500):

> "Assuming that the committee had power to agree to pay the expenses out of general assets, provided there remained sufficient to pay general creditors in full, not only is it open to serious doubt whether the committee had power to make such agreement as against general creditors of an insolvent estate (especially in view of the terms of the stockholders' assignment to the committee), but in our opinion to impose such liability would be inequitable as against general creditors."

Other cases dealing with contribution and apportionment of receivership expenses as between funds allocable to different classes of claimants, are: *Pennsylvania Co. for Ins. on Lives* v. *Jacksonville, etc., R. Co.* 66 Fed. 421 (C. C. A. 5); *American Pig Iron Storage Warrant Co.* v. *German,* 126 Ala. 194, 28 So. 603; *Central Trust Co.* v. *Chester County Electric Co.* 9 Del. Ch. 247, 80 Atl. 801; *Fagan Iron Works* v. *Calumet Construction Co.* 82 N. J. E. 345, 88 Atl. 1069; *Cannon* v. *Snipes,* 32 Wash. 243, 73 Pac. 379.

Anticipating this point, the opposing brief refers to an allegation in a pleading in the underlying proceeding in which the receivers were appointed, that the assets exceed the liabilities by $13,000,000. Unfortunately this case does

not offer possibility of paying general creditors in full. There was adjudication in bankruptcy March 10, 1934 (R. 91). In receiverships, initial allowances cannot proceed upon the optimistic assumption that all claims of every class will be paid in full. *American Iron & Steel Mfg. Co.* v. *Seaboard Air Line Ry.* 233 U. S. 261, 266-7.

Courts Do Not Favor Provisions of a Contract Creating a Penalty, Particularly When That Penalty Is Directed Not Toward the Party to the Contract But Toward the Assets of an Estate in Receivership or Bankruptcy.

The claim for sky-rocketing of interest, at the most, is assertion of a penalty because a receiver was appointed. (Opposing brief, p. 3, footnote.) It is thus an attempt to profit unfairly at the expense of assets in receivership or bankruptcy administration.

In *Kothe, Trustee* v. *R. C. Taylor Trust,* 280 U. S. 224, a somewhat similar penalty in a lease was unenforcible in bankruptcy, the court saying, at p. 226:

> "The parties were consciously undertaking to contract for payment to be made out of the assets of a bankrupt estate—not for something which the lessee personally would be required to discharge. He, therefore, had little, if any, immediate concern with the amount of the claim to be presented; most probably, that would affect only those entitled to share in the proceeds of property beyond his control.
>
> The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate among creditors holding just demands based upon adequate consideration. Any agreement which tends to defeat that beneficient design must be regarded with disfavor. * * *"

Funds in Custodia Legis and Not Held for Unreasonable Periods Do Not Ordinarily Bear Interest Unless Interest Is Earned Upon Such Funds.

The facts have been sufficiently stated. We refer to the following authorities in support of the above heading: *Thomas* v. *Western Car Company,* 149 U. S. 95; *American Iron and Steel Manufacturing Co.* v. *Seaboard Air Line Railway,* 233 U. S. 261; *Chemical National Bank* v. *Armstrong,* 59 Fed. 372 (C. C. A. 6); *Richardson* v. *Louisville Banking Co.* 94 Fed. 442 (C. C. A. 5). See also *Sexton* v. *Dreyfus,* 219 U. S. 339.

There is no contention that the funds in the special bank account drew any interest.

Denial by Equity of the Relief Prayed.

The finance company entered the proceeding by an intervening petition. The money received from collections, there having been no notices of the assignments, would necessarily come into the proceeding, and the receivers became vested with at least legal title to the money. And the intervening petition prayed that *the money* be paid to the finance company. So much for the contention that the finance company did not pray for equitable relief.

There has never been, in this litigation, any contention that under Illinois law a corporation may not contract to pay interest in excess of the so-called statutory rate. Neither court found usury.

All contracts, whatever their subject matter, have always been subject, in a court of equity, to refusal of relief thereunder, in whole or in part, if the relief prayed be unconscionable or if the attitude is unconscientious in respect of the matter concerning which relief is sought.

The present facts speak for themselves:

1. The finance company sought to charge the receivers with large interest after receivership, though extensive work of the receivers, at the expense of general creditors, was necessarily rendered to conserve and to collect the accounts. There was no offer, and no willingness, to share in any respect in this expense.

2. The assertion of interest was of a rate ranging between 20 per cent and 290 per cent. Such a charge was never asserted against Grigsby-Grunow Company. If the possibility of a demand against receivers or a trustee in bankruptcy, with sky-rocketing of interest, was ever contemplated by the finance company, we cannot see that the manner of contract drafting was to its credit. Is a court of equity administering an estate in receivership bound to entertain such an unfair demand? If so, we assume that in the future such a contract, and corporate officers are not always interested in what may happen after receivership or bankruptcy, may lawfully provide that in the event of receivership or bankruptcy the assignee may simply keep all the security. If such were the letter of the contract, what defense even in a court of equity could be interposed, if our opponent's brief be sound doctrine?

3. Attorney's fees of $7,800 were demanded in the trial of a simple issue, involving at the maximum $3,306.55.

National Fire Insurance Co. v. *Thompson,* 281 U. S. 331, 338:

> "Courts of equity frequently decline to interfere on behalf of a complainant whose attitude is unconscientious in respect of the matter concerning which it seeks relief."

Miss. & Mo. R. R. v. *Cromwell,* 91 U. S. 643, 645:

> "The court is not bound to shut its eyes to the evident character of the transaction. It will never lend its aid to carry out an unconscionable bargain, but will leave the party to his remedy at law. This has been so often held on bills for specific performance, and in other analogous cases, that it is unnecessary to spend argument on the subject."

See also *Cragin* v. *Powell,* 128 U. S. 691; *Deweese* v. *Reinhard,* 165 U. S. 386; *Randolph's Administrator* v. *Quidnick Co.,* 135 U. S. 457.

"He who seeks equity must do equity" is a principle as old as equity. Pomeroy's Equity Jurisprudence, 4th Ed., Vol. I, Sec. III; *Williams* v. *Dutton,* 184 Ill. 608, 612, "will not lend its aid to a complainant unless even-handed justice and good conscience demand that relief should be granted;" *Winslow* v. *Noble,* 101 Ill. 194; *Glos* v. *Stuckart,* 277 Ill. 346.

Certainly this general equitable principle is not set aside merely because the contract in issue involves a lending of money.

In re Reed & Furniture Co. 7 F. (2d) 885 (C. C. A. 7, 1925):

> "The later statute may or may not have repealed *pro tanto* the usury law of the state, but it did not abrogate the rule that courts of equity will not lend their aid to enforce contracts which upon their face are so manifestly harsh and oppressive as to shock the conscience."

Irrespective of usury laws, Illinois courts of equity have always refused to enforce lending contracts considered oppressive and unconscionable. *Jenkins* v. *Greenbaum,* 95 Ill. 11; *Higgins* v. *Lansingh,* 154 Ill. 301. See also *Cutting* v. *How,* 8 Mass. 257; *Van Benschooten* v. *Lawson,* 6 Johns. Ch. (N. Y.) 313; 66 Corpus Juris 143. In Illinois, even in courts upon the law side, contracts for compound interest (there is no statutory provision) are held unen-

forcible. *Bowman* v. *Neely,* 137 Ill. 443; *Bowman, admr.* v. *Neely,* 151 Ill. 37.

The Circuit Court of Appeals in the present case said, 72 F. (2d) 471, at 473:

> "But where the creditor goes beyond the practice of the parties under the original contract and tries to enforce rights never asserted against the other contracting party, and in addition tries to collect counsel fees exceeding 177 per cent of the maximum amount claimed against the receiver who is attempting to salvage the assets for the benefit of the other creditors who have a substantial interest in the estate of the debtor, we cannot feel that a court of equity is any place for him to press his demands."

Respectfully submitted,

THOMAS L. MARSHALL,
134 South La Salle Street,
Chicago,
Counsel for Respondent.

FILE COPY

FEB 20 193

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 522

MANUFACTURERS' FINANCE COMPANY,
Petitioner,

vs.

FRANK M. McKEY, AS TRUSTEE IN BANKRUPTCY OF GRIGSBY-GRUNOW COMPANY,
Respondent.

MOTION BY RESPONDENT FOR LEAVE TO PRESENT TO THE COURT A STATEMENT ALTERING ANSWER TO A QUESTION DIRECTED BY THE COURT TO COUNSEL FOR RESPONDENT DURING THE ORAL ARGUMENT, FEBRUARY 14, 1935.

THOMAS L. MARSHALL,
134 South La Salle Street,
Chicago,
Counsel for Respondent.

THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 522

MANUFACTURERS' FINANCE COMPANY,
Petitioner,

vs.

FRANK M. McKEY, AS TRUSTEE IN BANKRUPTCY OF GRIGSBY-GRUNOW COMPANY,
Respondent.

MOTION BY RESPONDENT FOR LEAVE TO PRESENT TO THE COURT A STATEMENT ALTERING ANSWER TO A QUESTION DIRECTED BY THE COURT TO COUNSEL FOR RESPONDENT DURING THE ORAL ARGUMENT, FEBRUARY 14, 1935.

Now comes Frank M. McKey, trustee, by his counsel, and respectfully asks leave to present to the Court the following statement altering answer to a question directed by the Court to counsel for respondent during the oral argument, February 14, 1935.

Respectfully presented,

THOMAS L. MARSHALL,
134 South LaSalle Street, Chicago,
Counsel for Respondent.

We were asked whether, upon leave of court, the finance company could not have maintained against the receivers an action at law for money had and received.

This question was answered in the affirmative. We wholly omitted, however, to point out the fact, indisputable upon the record, that on November 29, 1933, when the intervening petition was filed by the finance company, *only an inconsequential sum of money had at that time been received* by the receivers from the assigned accounts (R. 24, lines 2-6). The accounts were at that time badly frozen (R. 24.) While the remedy at law of the action for money had and received theoretically existed, it was at that time practically valueless.

The finance company's intervening petition sought, in advance of receipt by the receivers of moneys from the assigned accounts, to obtain a decree to impress in advance a trust. Or expressed in another way, the relief prayed is not unlike the relief prayed in a bill to foreclose a pledge, the liquidation of the accounts standing in lieu of the conventional sale of the collateral.

We quote the last paragraph of the intervening petition (R. 16):

> "Your petitioner further prays the court that an order directing the receivers herein to deliver to your petitioner all moneys, or other evidences of payment, by them collected, or on account of the accounts so assigned to your petitioner, together with any and all evidences of indebtedness received or held by them, arising out of the collection or attempted collection of said accounts, until such time as your petitioner shall have received the amount due to it, together with its reasonable attorney's fees, costs and expenses in this behalf expended, and to that end, if it be found necessary, to order an audit or accounting for the purposes thereof."

The finance company's theoretical remedies therefore were three:

1. With leave of court, to give notices to the debtors of the assigned accounts, and to deal with the collateral without utilizing the receivership. After leave of court had been obtained, the receivers would have had nothing to do with this course of action, unless such a wasteful course had been pursued by the finance company as to have justified injunctional relief to the receivership estate or to the general creditors. The finance company did not wish to pursue, and did not pursue, this course, because it undoubtedly would have resulted in loss to them of principal (R. 24, lines 2-6; R. 71, opinion of District Court, lines 12-27).

2. With leave of court, to sue the receivers at law for money had and received. On November 29, 1933, this remedy was inconsequential, because the accounts were badly frozen, and sums then "had and received" were wholly inconsequential in amount. (References to record, *supra*). This remedy was not pursued. The finance company desired to effect a remedy in advance of receipt of moneys by the receivers, lest the moneys when received be otherwise used by the receivers.

3. The remedy actually pursued.

Respectfully submitted,

THOMAS L. MARSHALL,
134 South LaSalle Street, Chicago,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 522.—October Term, 1934.

Manufacturers' Finance Company, Petitioner, *vs.* Frank M. McKey, as Trustee in Bankruptcy of the Estate of Grigsby-Grunow Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[March 4, 1935.]

Mr. Justice Sutherland delivered the opinion of the Court.

This writ brings here for consideration certain questions in respect of the enforcement of a contract between petitioner and Grigsby-Grunow Company (hereinafter referred to as the company) made October 5, 1933. The contract purports to be one for the purchase of designated accounts receivable for which petitioner promised to pay 100% of the actual net amounts thereof, less a charge for interest on the purchase money outstanding and less compensation for certain services rendered or to be rendered by petitioner. Fifty per cent. of the actual net amounts was to be paid in cash upon acceptance of the accounts; and the remainder, with specified deductions and additions, was to be paid immediately upon payment of the accounts. All original checks, drafts, notes, etc., received by the company in full or partial payment of any of the accounts so purchased were to be delivered to petitioner at its office on the day of their receipt. Attorneys' fees, costs and expenses incurred by petitioner were to be paid by the company. Compensation for services was to be at the rate of 83½% of 1/30th of 1% of the net face amount of accounts for each day from the date of purchase. Total charges against the company, as estimated by the parties, would equal about 20% per annum upon the outstanding balance of cash advances up to November 24, 1933.

Among other services, petitioner agreed to furnish to the company specified information upon request in respect of customers; to furnish information and advice as to the most desirable method of

keeping books, records, and accounts of the company; to give, upon request, financial and business advice; to obtain and have on hand at all times funds to make prompt remittance for acceptable accounts; to supply forms needed for assignment of accounts; to put its credit and collection department at the disposal of the company and to furnish advice and opinions as to the form and legality of the company's sales contracts with its customers.

On November 24, 1933, in a suit brought by a creditor against the company, a federal district court for the northern district of Illinois appointed receivers to preserve the property and assets of the company. The company was solvent, having assets greatly exceeding its liabilities; and the receivers were directed to continue the business as a going concern and to do all things necessary to that end and to preserve the property. They were directed to take charge of all assets, books of account, etc.; to employ and discharge and fix compensation of employees, agents, etc.; to collect, sell and liquidate accounts, etc.; and to purchase on credit or otherwise such supplies and equipment as might be necessary to continue the business as a going concern. All persons were enjoined from interfering with the receivers in their possession of the property, the administration of their trust, or in the performance of the duties imposed upon them.

The receivers refused to pay over to petitioner anything collected on the assigned accounts unless directed to do so by the court. Subsequently, such direction being given, the receivers from time to time paid to petitioner various sums which, together with an amount collected by the petitioner itself, finally liquidated the amount due petitioner up to the time when the receivers were appointed. This liquidation was effected between the date of the receivership and December 29, 1933—a period of 35 days. Petitioner had already (on November 29, 1933) intervened in the receivership proceeding with a petition seeking compliance on the part of the receivers with the terms of its contract; and, after the liquidation to the extent stated above had been effected, petitioner continued the proceeding under its petition, demanding payment at the contract rate of a sum aggregating, at the end of the 35-day period, $4,394.48, together with reasonable attorneys' fees and costs. No accounts were purchased or assigned after the receivership, and the only obligation which remained was to carry

out the terms of the contract in so far as they affected the accounts already assigned.

The gross sum which petitioner received under the contract for the time prior to the receivership was equal to the estimated 20% per annum on the moneys actually advanced to the company. The amount which it was claimed had accrued during the 35-day period was equivalent to an average of about 28.3% per annum from the date of the appointment of the receivers. The petition asked for reasonable attorneys' fees without specifying any amount. The only testimony on the subject was that of an attorney who said the sum of $7,800 was reasonable.

The district court entered a decree in favor of petitioner for $1,087.93, being at the rate of 7% instead of 28.3% per annum upon the outstanding balances. That court denied all further relief on the sole ground that petitioner's demand was inequitable and that in making it petitioner had not come into equity with clean hands. The decree was affirmed by the court of appeals. 72 F. (2d) 471. The basis of that court's decision cannot be better stated than in its own words:

"The insistence of appellant upon its claim for the full rate of interest plus attorneys' fees at a preposterous rate, when it appeared that there was no more business to be done under the contract because of the receivership of the Company savors too much of the exaction of the pound of flesh from the creditors of the insolvent company to be enforcible in a court of equity. If this case arose in an action at law between the original parties it may well be that the court could not refuse to enforce the contract according to its strictest terms. But where the creditor goes beyond the practice of the parties under the original contract and tries to enforce rights never asserted against the other contracting party, and in addition tries to collect counsel fees exceeding 177% of the maximum amount claimed against the receiver who is attempting to salvage the assets for the benefit of the other creditors who have a substantial interest in the estate of the debtor, we can not feel that a court of equity is any place for him to press his demands."

February 18, 1934, while the appeal was pending in the court of appeals, a petition in bankruptcy was filed in the federal district court against the company; and this was followed by an adjudication of bankruptcy and the selection, April 16, 1934, and qualification, later, of the respondent McKey as trustee in bank-

ruptcy. Subsequently, upon the application of both parties, McKey was substituted in the court of appeals as appellee.

In connection with the discussion which follows, two considerations are to be borne in mind. 1. When the receivers were appointed November 24, 1933, the company was solvent, having assets exceeding its liabilities in the sum of $13,000,000, and there is nothing in the record to suggest that this condition of solvency did not continue until after the completion of the 35-day period here involved. 2. What effect, if any, an act of bankruptcy might have had upon the life or operation of the contract we need not determine, since it is plain that the appointment of a receiver upon the application of a creditor is not an act of bankruptcy except in cases of insolvency. Title 11, U. S. C. § 21 (a), as amended May 27, 1926, Title 11, U. S. C. Supp. VII, § 21 (a) (5); *Nolte* v. *Hudson Nav. Co.*, 8 F. (2d) 859, 866; *Meek* v. *Beezer*, 28 F. (2d) 343, 345; *In re Edward Ellsworth Co.*, 173 Fed. 699, 700-701; *In re Guardian Building & Loan Ass'n*, 53 F. (2d) 412, 415.

The effect of the contract was to bind the company as agent of petitioner to collect the purchased accounts and deliver to the latter the proceeds in kind from day to day as fast as they were collected. The receivers were equally bound.

The extent of the benefit which accrued to the company by reason of the advantages which evidently were expected to result from the opportunity to avail itself of the use of a large part of the proceeds of the accounts in advance of their payment, and from the services of petitioner, is not a matter for judicial inquiry. The parties dealt at arm's length. The contract was voluntarily executed by the board of directors of the company. It is not suggested that there was any mistake or any fraud or overreaching on the part of petitioner. The contract, it is conceded, is valid under the statutes of Illinois as construed by the Supreme Court of the State, *Tennant* v. *Joerns*, 329 Ill. 34; and, so far as the record discloses, it was performed on the part of petitioner in all respects up to, at least, the appointment of the receivers.

But the court below refused to be bound by the law of Illinois, upon a theory which it had advanced in a former case, *In re Chicago Reed & Furniture Co.*, 7 F. (2d) 885, namely, that a state law can not "abrogate the rule that courts of equity will not lend their aid to enforce contracts which upon their face are so mani-

festly harsh and oppressive as to shock the conscience." With that view as here applied we are unable to agree.

The contract was in force when the receivers were appointed; and it continued effective until the expiration of thirty-five days thereafter, at which time it was brought to an end. During that period, if there were no default on petitioner's part, the contract, in so far as it remained unperformed, was enforcible against these receivers as theretofore it had been against the company. *Merchants' & Manufacturers' Securities Co.* v. *Johnson*, 69 F. (2d) 940, 945; compare *Fosdick* v. *Schall*, 99 U. S. 235, 251.

The mere fact that a party is obliged to go into a federal court of equity to enforce an essentially legal right arising upon a contract valid and unassailable under controlling state law does not authorize that court to modify or ignore the terms of the legal obligation upon the claim, or because the court thinks, that these terms are harsh or oppressive or unreasonable. A party may stand upon the terms of a valid contract in a court of equity as he may in a court of law. "If he asks no favors, he need grant none. But if he calls on a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases and do equity in order to get equity." *Fosdick* v. *Schall, supra*, at p. 253. The petitioner here did not seek equitable relief. It sought an enforcement of its legal rights; and, as said by the Supreme Court of Pennsylvania, "Legal rights are as safe in chancery as they are in a court of law, and however strong an appeal may be to the conscience of a chancellor for equitable relief, he is powerless to grant it if the one from whom it must come will be deprived of a legal right." *Colonial Tr. Co., Appellant* v. *Central Tr. Co.*, 243 Pa. 268, 276. The maxim "he who seeks equity must do equity" presupposes that equitable, as distinguished from legal, rights, substantive or remedial, have arisen from the subject matter in favor of each of the parties; and it requires that such rights shall not be enforced in favor of one who affirmatively seeks their enforcement except upon condition that he consent to accord to the other his correlative equitable rights. But it is well settled, this court said in *Hedges* v. *Dixon County*, 150 U. S. 182, 189, "that a court of equity, in the absence of fraud, accident or mistake, cannot change the terms of a contract."

Missouri, Kansas &c. Trust Co. v. *Krumseig*, 172 U. S. 351, dealt with the precise question now under consideration. The situation presented there was the converse of that presented here, but the applicable principle is the same. There, suit was brought in equity in a state court to cancel a mortgage and certain notes secured thereby, on the ground that they embodied a contract bad for usury under a state statute. The suit was removed to a federal district court. That court granted the relief which was sought, conditionally, and its decree was affirmed by the circuit court of appeals. The state law declared such a contract to be wholly void. Both courts, however, invoking the equitable maxim "he who seeks equity must do equity", held that the plaintiff could not have the relief except on the generally recognized equitable condition that he pay to the lender the money loaned together with legal interest. This court, rejecting the view of the lower courts that a federal court in the exercise of its jurisdiction cannot be deprived of the power or relieved of the duty to enforce and apply the established principle of equity embodied in the maxim, said (pp. 358-359):

"We think it a satisfactory reply to such a proposition that the complainants in the present case were not seeking equity, but to avail themselves of a substantive right under the statutory law of the State. . . . With the policy of the state legislation the Federal courts have nothing to do. If the States . . . think that the evils of usury are best prevented by making usurious contracts void, and by giving a right to the borrowers to have such contracts unconditionally nullified and cancelled by the courts, such a view of public policy, in respect to contracts made within the State and sought to be enforced therein, is obligatory on the Federal courts, whether acting in equity or at law. The local law, consisting of the applicable statutes as construed by the Supreme Court of the State, furnishes the rule of decision."

Compare *Brine* v. *Insurance Co.*, 96 U. S. 627.

Again, in *Columbus* v. *Mercantile Trust Co.*, 218 U. S. 645, 662, this court declined to apply the maxim in favor of a plaintiff who had failed to prove his case against a defendant, who had filed a cross bill for defensive relief, holding that the maxim applied only against one who had affirmatively sought equitable relief.

It seems to be conceded, or, if not, it must be, that in an action at law against the receivers the court would have been bound to

enforce the contract under review strictly in accordance with its terms. And, not to go beyond the case in hand, the rule is not otherwise where plaintiff, precluded by judicial order from proceeding at law, is obliged to submit the determination of his strictly legal rights to a chancery court because it has plenary control of the remedy.

The maxim that "he who comes into equity must come with clean hands", which the district court invoked and made the basis of its decision, for reasons similar to those already stated, is equally inapplicable. Certainly no unconscionable or inequitable conduct can be attributed to petitioner because it undertook to secure the fruits of a perfectly valid—albeit a hard—contract in the only court to which it could apply without being subject to a charge of contempt. Moreover, the maxim, if applicable, required the district court to halt petitioner at the threshold and refuse it any relief whatsoever—not to compromise with it, as the court did, by allowing a part of what was claimed. It seems plain enough that in no aspect of the case is any equitable principle involved.

The decisions of the court below in the present case and in the *Reed Furniture Co.* case, *supra,* are contrary to every other decision called to our attention or that we have been able to find involving a similar situation. A case practically the same as that presented here is *Merchants' & Manufacturers' Securities Co.* v. *Johnson, supra.* The contracts there involved were identical with the one here, and were likewise governed by the law of Illinois denying to a corporation the defense of usury. A receiver had been appointed to continue the business of the corporate parties to the contract. In deciding the case, the court of appeals of the Eighth Circuit emphasized the fact that the receiver was appointed (as the receivers were here) not to wind up the affairs of the corporations but to carry on their business as going concerns; and it held that he succeeded to their property subject to the contract rights which obtained at the time of his appointment. "He had no greater or different rights than those that might have been asserted by the companies." Reversing a decree of the district court, the court of appeals directed the entry of a decree in favor of the securities company for the full amount claimed, that amount to constitute a special lien upon all accounts receivable still unpaid and upon the proceeds of the same in the hands of the receiver. *In re Inter-*

national Raw Material Corporation, 22 F. (2d) 920, involved a contract which, although not in identical terms, was in principle the same as that here under consideration. That court, resting upon a New York statute denying to a corporation the defense of usury, enforced the contract against a trustee in bankruptcy. It considered and definitely rejected the doctrine announced in the *Reed Furniture Co.* case, holding there was no justification for nullifying the agreement of the parties because the interest and commissions deliberately arranged were too large to satisfy the ideas of a court. See, also, to the same effect, *In re Gotham Can Co.,* 48 F. (2d) 540; *Ramsey* v. *Marlin Firearms Corporation,* 14 F. (2d) 314; *Estes* v. *E. B. Estes & Sons,* 24 F. (2d) 756.

We see no escape from the logic of these decisions.

The receivers alleged as a defense, apparently by way of recoupment, that they had expended a large sum of money in making collection of the accounts which inured to the benefit of petitioner by assuring to it a return of its advances. The district court found that the receivers, among other things, had expended $35,000 in advertising in order to maintain the good will of the company and preserve its receivables as live and valuable assets, and seemed to think that the petitioner had been benefited thereby. No suggestion, however, is made by either of the lower courts or by the respondent as to how much of these expenditures should be borne by petitioner; and the record affords no information by which the amount can be calculated. Even less does it appear how much, if any, of these expenditures related to the assigned accounts.

Whether, upon further and more definite evidence, under all the circumstances and consistently with the provisions of the contract, petitioner may be held for any part of these expenditures, we do not determine.

Both lower courts refused to allow any amount for attorneys' fees, apparently on the ground, which we have rejected, that to do so would be contrary to equitable principles. The contract seems to contemplate a reasonable allowance for such fees, but the amount, if any, remains to be fixed by the district court upon consideration of all pertinent facts relating to services rendered by the attorneys after the date of the receivership, and with due relation to its ultimate determination upon the merits.

As already appears from what has been said, the decrees below rest wholly on the untenable assumption that petitioner's rights

are subject to denial or curtailment in virtue of equitable principles applicable only against one who affirmatively has sought equitable relief; and here that was not the case. The question, or extent, of petitioner's legal rights—relieved of this assumption—has been neither determined nor considered upon the facts or the applicable law. The duty and responsibility of that consideration and determination lie primarily with the lower courts; and, in the light of the peculiar circumstances disclosed by the record, should not, we think, be assumed in the first instance by this court. To the end that such duty and responsibility may be discharged, we conclude that the decrees of both courts should be reversed and the cause remanded to the district court for further proceedings in conformity with the foregoing opinion.*

We refrain from expressing any opinion as to the effect of any change of circumstances, due to the receivership and liquidation of petitioner's claims during the period in question, upon the amount, if any, of petitioner's recovery, or any opinion in respect of the law applicable thereto.

Reversed.

*This disposition of the case finds precedent in a large number of decisions of this court, among which the following are cited as examples: Owensboro *v.* Owensboro Waterworks Co., 191 U. S. 358, 372; Wilson Cypress Co. *v.* Del Pozo, 236 U. S. 635, 656-7; Brown *v.* Fletcher, 237 U. S. 583, 586; Gerdes *v.* Lustgarten, 266 U. S. 321, 327; Twist *v.* Prairie Oil Co., 274 U. S. 684, 692; United States *v.* Brims, 272 U. S. 549, 553; Grant *v.* Leach & Co., 280 U. S. 351, 363.